

REPORT
of the
ATTORNEY GENERAL

of the
STATE OF FLORIDA

FROM JANUARY 1, 1939, TO DECEMBER 31, 1940

GEORGE COUPER GIBBS

ATTORNEY GENERAL

Allie Y. Brown

Reporter



Tallahassee, Fla.

1940

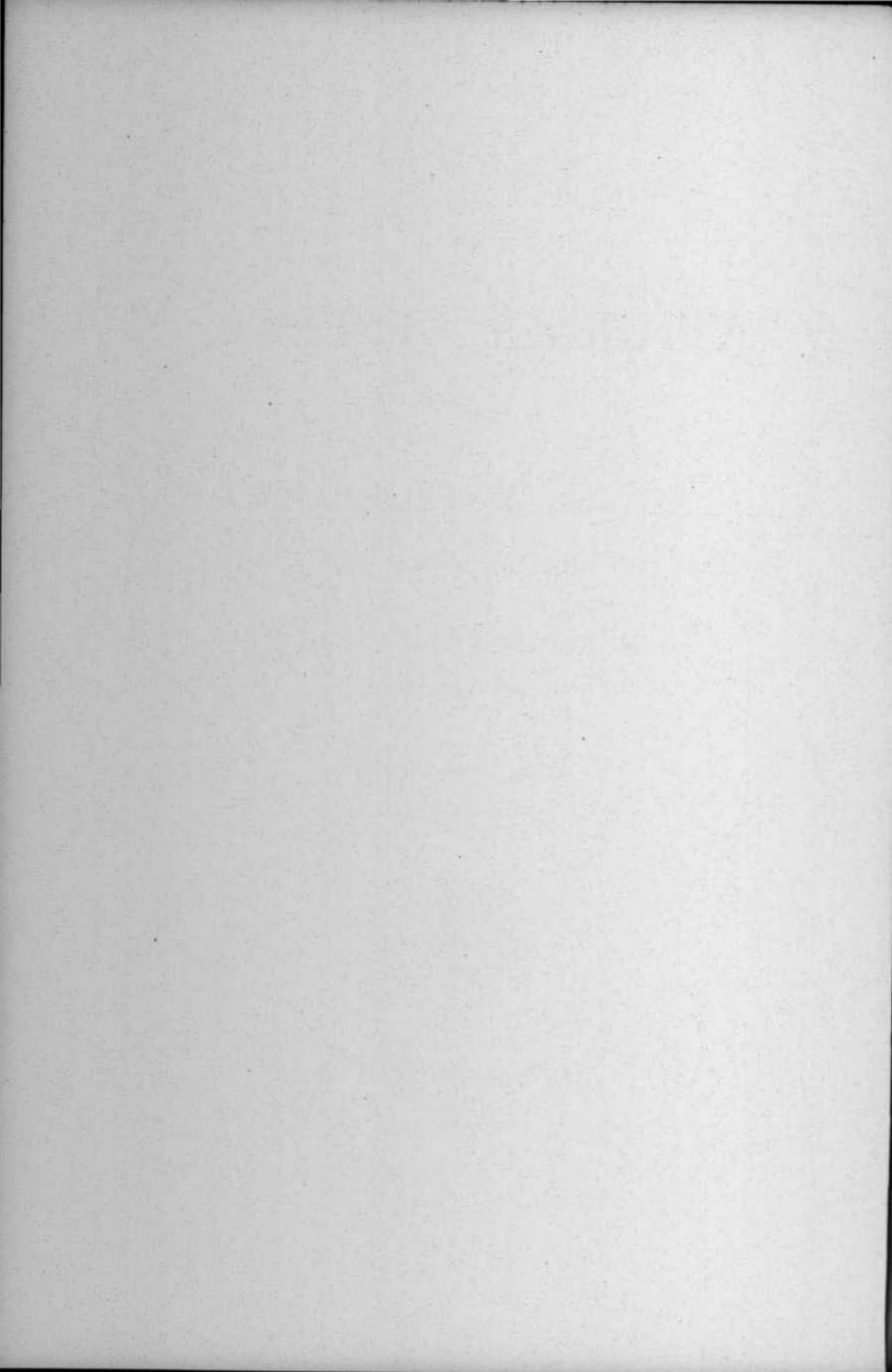


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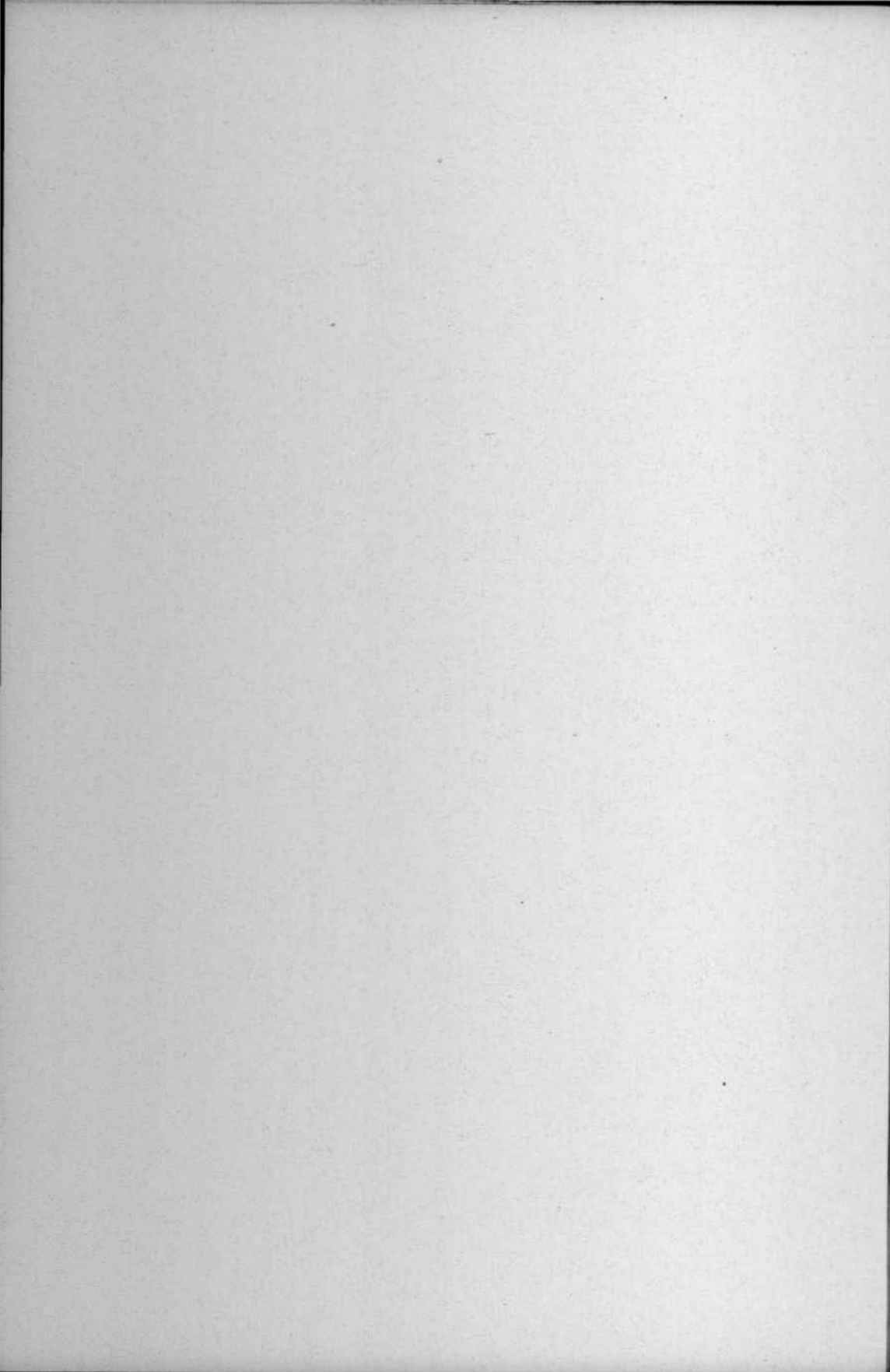
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I

STATE LAW DEPARTMENT

GEORGE COUPER GIBBS, Attorney General

H. E. CARTER	Assistant Attorney General
ROY CAMPBELL	Assistant Attorney General
MARVIN C. MCINTOSH	Assistant Attorney General
THOMAS J. ELLIS ¹	Assistant Attorney General
JOHN L. GRAHAM	Assistant Attorney General
J. COMPTON FRENCH	Assistant Attorney General
TYRUS A. NORWOOD	Assistant Attorney General
LAWRENCE A. TRUETT	Assistant Attorney General
WILLIAM FISHER, JR.	Assistant Attorney General
NATHAN COCKRELL	Assistant Attorney General
ALLIE Y. BROWN.....	Chief Clerk, Bookkeeper and Supreme Court Reporter
LORRAINE W. EVANS	Secretary
R. L. DURRANCE	Law Clerk
MARGARET E. GANNON	Law Clerk-Stenographer
EVELYN DAVIS	Law Clerk-Stenographer
BERTA W. BOHLER	Law Clerk-Stenographer
HATTIE ROEBUCK	Law Clerk-Stenographer
FRANCES BOND ²	Law Clerk-Stenographer
ELIZABETH GENTRY	Stenographer
MARION GARDINER ³	Stenographer
LILLIE B. PACE	Stenographer
ANNIE T. ANDERSON	Stenographer
NELLIE CONE OWEN	Stenographer
MORDINA F. BRAGUNIER	File Clerk
JOHN COLLIER HORNE	Receptionist

¹Resigned and Mr. William Fisher, Jr., was appointed.

²Resigned and Mrs. Elizabeth Gentry was appointed.

³Resigned and Mrs. Lillie B. Pace was appointed.

STATUTORY REVISION, RESEARCH AND DRAFTING

GEORGE COUPER GIBBS, Attorney General

LEWIS H. TRIBBLE	Assistant Attorney General
FRED M. BURNS	Assistant Attorney General
GUY A. RACE*	Assistant Attorney General
JAMES W. MOORE*	Assistant Attorney General
J. C. ADKINS	Assistant Attorney General
WOODROW MELVIN	Assistant Attorney General
HAZEL B. SANDERSON	Secretary
BESSIE MARTIN	Secretary
VIDA S. GRAMLING	Stenographer
ROSA LEE CAIN*	Stenographer
FRANCES KELLY*	Paster and Clipper
BURNICE HOWEY*	Paster and Clipper
HARRY B. MINNIUM, JR.	Index Clerk
LEILA K. COFIELD*	File Clerk
ANNELL CANTLEY	Typist

*Resigned

II

ATTORNEYS GENERAL OF FLORIDA

1845-1941

JOSEPH BRANCH	1845-1846
AUGUSTUS E. MAXWELL	1848-1848
JAMES T. ARCHER	1848-1848
DAVID P. HOGUE	1848-1853
MARIANO D. PAPY	1853-1860
JOHN B. GALBRAITH	1860-1868
JAMES D. WESTCOTT, JR.	1868-1868
A. R. MEEK	1868-1870
SHERMAN CONANT	1870-1870
J. P. C. DREW	1870-1872
H. BISSBEE, JR.	1872-1872
J. P. C. EMMONS	1872-1873
WILLIAM A. COCKE	1873-1877
GEORGE P. RANEY	1877-1885
C. M. COOPER	1885-1889
WILLIAM B. LAMAR	1889-1903
JAMES B. WHITFIELD	1903-1904
W. H. ELLIS	1904-1909
PARK TRAMMELL	1909-1913
THOMAS F. WEST	1913-1917
VAN C. SWEARINGEN	1917-1921
RIVERS BUFORD	1921-1925
J. B. JOHNSON	1925-1927
FRED H. DAVIS	1927-1931
CARY D. LANDIS	1931-1938
GEORGE COUPER GIBES	1938-1941

ASSISTANT ATTORNEYS GENERAL OF FLORIDA

CHARLES O. ANDREWS	1911-1919
GLENN TERRELL	1915-1917
WORTH TRAMMELL	1917-1921
D. Stuart Gillis	1919-1921
J. B. GAINES	1921-1926
MARVIN C. McINTOSH	1921-1926
H. E. CARTER.....	1926-1941
ROY CAMPBELL.....	1926-1941
MARVIN C. McINTOSH.....	1931-1941
ROBERT J. PLEUS	1933-1935
J. V. KEEN	1933-1936
IRA A. HUTCHISON.....	1933-1935
JOHN L. GRAHAM.....	1935-1941
JAMES B. WATSON	1935-1937
W. P. ALLEN	1936-1939
J. COMPTON FRENCH.....	1937-1941
TYRUS A. NORWOOD.....	1937-1941
LAWRENCE A. TRUETT.....	1937-1941
THOMAS J. ELLIS	1939-1940
WILLIAM FISHER, JR.	1940-
NATHAN COCKRELL.....	1940-1941
LEWIS H. TRIBBLE.....	1939-1941
FRED M. BURNS.....	1939-1941
GUY A. RACE	1939-1940
JAMES W. MOORE	1939-1940
J. C. ADKINS.....	1940-1941
WOODBROW MELVIN.....	1940-1941

SPECIAL ASSISTANTS TO THE ATTORNEY GENERAL UNDER CHAPTER 11828, ACTS OF 1927

(Repealed by Chapter 14556, Acts of 1930)

Approved June 19, 1929)

A. H. WILLIAMS, Tallahassee, Florida

J. McHENRY JONES, Pensacola, Florida

WALLACE TERVIN, Bradenton, Florida

III

JUDICIAL DEPARTMENT OF FLORIDA

SUPREME COURT JUSTICES

TALLAHASSEE

JANUARY

1941

DIVISION A

Hon. GLENN TERRELL,¹ Chief Justice.
 Hon. RIVERS BUFORD.
 Hon. ELWYN THOMAS.²

DIVISION B

Hon. JAMES B. WHITFIELD,³ Presiding Justice.
 Hon. ARMSTEAD BROWN.⁴
 Hon. R. H. CHAPMAN.
 Hon. G. TALBOT WHITFIELD,⁵ Clerk Supreme Court.
 Hon. GEORGE COUPER GIBBS,⁶ Attorney General.
 Hon. T. T. TURNBULL, Attorney for State Railroad Commission.
 Hon. RICHARD P. DANIEL,⁶ Attorney for State Road Department.

JUDGES OF THE CIRCUIT COURT

FIRST CIRCUIT.....Hon. A. G. CAMPBELL.⁷
 Hon. L. L. FABISINSKI.
 SECOND CIRCUIT.....Hon. EDWARD C. LOVE.
 Hon. J. B. JOHNSON.⁸
 THIRD CIRCUIT.....Hon. HAL W. ADAMS.
 Hon. R. H. ROWE.
 FOURTH CIRCUIT.....Hon. BAYARD B. SHIELDS.
 Hon. A. D. McNEILL.
 Hon. DeWITT T. GRAY.
 DUVAL CIRCUIT.....Hon. MILES W. LEWIS.
 FIFTH CIRCUIT.....Hon. J. C. B. KOONCE.
 Hon. FRED L. STRINGER.⁹
 SIXTH CIRCUIT.....Hon. JOHN U. BIRD.
 Hon. JOHN L. VINEY.¹⁰
 Hon. T. FRANK HOBSON.

¹ Hon. Armstead Brown elected Chief Justice sitting as a member of A and B.
 Hon. Glenn Terrell is a member of Division B.

² Hon. Alto Adams was appointed and is a member of Division A.

³ Hon. James B. Whitfield is a member of Division A.

⁴ Deceased, and Hon. Guyte P. McCord was appointed on April 1, 1939.

⁵ Term expired and Hon. Tom Watson elected.

⁶ Resigned and Hon. Tom Schackleford appointed.

⁷ Deceased and Hon. R. A. McGeachy was commissioned on June 19, 1939.

⁸ Deceased, and Hon. W. May Walker was commissioned on July 1, 1940.

⁹ Term expired, and Hon. F. R. Hocker was commissioned on May 12, 1939.

¹⁰ Retired.

SEVENTH CIRCUIT.....	Hon. HERBERT B. FREDERICK. Hon. GEO. WM. JACKSON.
EIGHTH CIRCUIT.....	Hon. H. L. SEBRING. Hon. A. Z. ADKINS.
NINTH CIRCUIT.....	Hon. ELWYN THOMAS. ¹¹ Hon. M. B. SMITH. Hon. FRANK A. SMITH.
TENTH CIRCUIT.....	Hon. H. C. PETTEWAY. Hon. W. J. BARKER. ¹²
ELEVENTH CIRCUIT.....	Hon. H. F. ATKINSON. ¹³ Hon. WORTH W. TRAMMELL. Hon. PAUL D. BARNES. Hon. ARTHUR GOMEZ.
TWELFTH CIRCUIT.....	Hon. GEO. W. WHITEHURST. Hon. W. T. HARRISON.
THIRTEENTH CIRCUIT.....	Hon. L. L. PARKS. Hon. HARRY N. SANDLER.
FOURTEENTH CIRCUIT.....	Hon. E. C. WELCH. Hon. IRA A. HUTCHISON.
FIFTEENTH CIRCUIT.....	Hon. C. E. CHILLINGWORTH. Hon. GEO. W. TEDDER.

JUDGE OF THE COURT OF RECORD

ESCAMBIA COUNTYHon. H. POPE REESE.

JUDGES OF THE CRIMINAL COURT OF RECORD

DADE COUNTY	Hon. BEN C. WILLARD.
DUVAL COUNTY	Hon. WM. J. PORTER. ¹⁴
HILLSBOROUGH COUNTY.....	Hon. JOHN R. HIMES.
MONROE COUNTY	Hon. W. V. ALBURY.
ORANGE COUNTY	Hon. W. M. MURPHY.
PALM BEACH COUNTY.....	Hon. JOHN L. MOORE.
POLK COUNTY.....	Hon. ROBERT T. DEWELL.

JUDGES OF THE COURT OF CRIMES

DADE COUNTY	Hon. WAYNE ALLEN.
DUVAL COUNTY	Hon. LONNIE D. HOWELL, ¹⁵ Jacksonville.

JUDGES OF THE CIVIL COURT OF RECORD

DADE COUNTY	Hon. D. J. HEFFERNAN. Hon. ROSS WILLIAMS. ¹⁶
DUVAL COUNTY	Hon. BURTON BARRS.

¹¹ Resigned, and Hon. Alto Adams was commissioned on May 31, 1939.

¹² Resigned, and Hon. C. B. McClurg was commissioned on February 16, 1940.

¹³ Deceased, and Hon. Ross Williams commissioned on December 23, 1939.

¹⁴ Hon. Bryan Simpson nominated and commissioned on August 13, 1939.

¹⁵ Court created by 1939 Legislature, and Hon. Lonnie D. Howell was commissioned August 16, 1939.

¹⁶ Resigned, and Hon. Norman Hendry commissioned on June 4, 1940.

JUVENILE COURT JUDGES

BREVARD COUNTY	ALBERT M. BOLAND
DADE COUNTY	WALTER H. BECKMAN
DUVAL COUNTY	W. S. CRISWELL
HILLSBOROUGH COUNTY	PAUL KICKLITER
MONROE COUNTY	JULIETTE RUSSELL
ORANGE COUNTY	JAMES E. DIEFFENWIERTH
PINELLAS COUNTY	MAJOR L. PERRY

STATE ATTORNEYS

FIRST CIRCUIT	Hon. E. DIXIE BEGGS, Pensacola.
SECOND CIRCUIT	Hon. ORION C. PARKER, Tallahassee.
THIRD CIRCUIT	Hon. A. K. BLACK, Lake City.
FOURTH CIRCUIT	Hon. WM. A. HALLOWES, III, Jacksonville.
FIFTH CIRCUIT	Hon. J. W. HUNTER, Tavares.
SIXTH CIRCUIT	Hon. CHESTER B. McMULLEN, Clearwater.
SEVENTH CIRCUIT	Hon. MURRAY SAMS, DeLand.
EIGHTH CIRCUIT	Hon. J. C. ADKINS, ¹⁷ Gainesville.
NINTH CIRCUIT	Hon. MURRAY W. OVERSTREET, Kissimmee.
TENTH CIRCUIT	Hon. L. GRADY BURTON, Wauchula.
ELEVENTH CIRCUIT	Hon. G. A. WORLEY, Miami.
TWELFTH CIRCUIT	Hon. ROY STUBBS, ¹⁸ Fort Myers.
THIRTEENTH CIRCUIT	Hon. J. REX FARRIOR, Tampa.
FOURTEENTH CIRCUIT	Hon. JOHN H. CARTER, ¹⁹ Marianna.
FIFTEENTH CIRCUIT	Hon. LOUIS F. MAIRE, JR., ²⁰ Ft. Lauderdale.

COUNTY SOLICITORS

DADE	Hon. ROBERT R. TAYLOR, Miami.
DUVAL	Hon. L. D. HOWELL, ²¹ Jacksonville.
	Hon. JOHN W. MUSKOFF, ²² Jacksonville.
ESCAMBIA	Hon. JOHN LEWIS REECE, ²³ Pensacola.
HILLSBOROUGH	Hon. JOS. E. WILLIAMS, Tampa.
MONROE	Hon. ALLEN B. CLEARE, JR., Key West.
ORANGE	Hon. O. RAY ELLARS, Orlando.
PALM BEACH	Hon. W. E. ROEBUCK, West Palm Beach.
POLK	Hon. MANUEL M. GLOVER, ²⁴ Bartow.

¹⁷ Hon. T. E. Duncan nominated and commissioned on July 31, 1939.

¹⁸ Hon. Clyde L. Wilson nominated and commissioned July 31, 1939.

¹⁹ Hon. L. D. McRae nominated and commissioned on July 31, 1939.

²⁰ Hon. Phil. O'Connell nominated and commissioned on June 5, 1939.

²¹ Hon. Wayne E. Ripley nominated and commissioned on August 15, 1939.

²² Court of Crimes created by 1939 Legislature and Hon. John W. Muskoff was commissioned on August 14, 1939.

²³ Hon. Forsyth Caro nominated and commissioned on August 19, 1939.

²⁴ Hon. Gunter Stephenson nominated and commissioned on August 31, 1939.

IV

CIRCUIT COURT CALENDAR

FIRST JUDICIAL CIRCUIT

JUDGES	R. A. McGeachy, Milton.
	L. L. Fabisinski, Pensacola.
State Attorney	E. Dixie Beggs, Jr., Pensacola.
Court Reporter	Julian McKinnon, DeFuniak Springs.

Winter Term

Walton	2nd Monday in January.
Santa Rosa	2nd Monday after 2nd Monday in January.
Escambia	2nd Monday in February.
Okaloosa	2nd Monday in December.

Spring Term

Walton	2nd Monday in May.
Santa Rosa	2nd Monday after 2nd Monday in May.
Escambia	2nd Monday in June.
Okaloosa	Last Monday in April.

Fall Term

Walton	2nd Monday in September.
Santa Rosa	2nd Monday after 2nd Monday in September.
Escambia	2nd Monday in October.
Okaloosa	Last Monday in August.

SECOND JUDICIAL CIRCUIT

JUDGES	E. C. Love, Quincy.
	W. May Walker, Tallahassee.
State Attorney	O. C. Parker, Jr., Tallahassee.
Court Reporter	John H. Patterson, Jr., Tallahassee.

Spring Term

Franklin	3rd Monday in March.
Liberty	1st Monday in April.
Gadsden	1st Monday in March.
Wakulla	3rd Monday in April.
Jefferson	1st Monday in May.
Leon	3rd Monday in May.

Fall Term

Franklin	3rd Monday in September.
Liberty	1st Monday in October.

Gadsden	3rd Monday in October.
Wakulla	1st Monday in November.
Jefferson	3rd Monday in November.
Leon	1st Monday in December.

THIRD JUDICIAL CIRCUIT

JUDGES	R. H. Rowe, Madison. Hal W. Adams, Mayo.
State Attorney	A. K. Black, Lake City.
Assistant State Attorney	O. O. Edwards, Cross City.
Court Reporter	Gussie Miller, Lake City.

Spring Term

Hamilton	4th Monday in January.
Dixie	3rd Monday in February.
Taylor	4th Monday in March.
Madison	2nd Monday in April.
Columbia	4th Monday in April.
Suwannee	2nd Monday in May.
Lafayette	2nd Monday in June.

Fall Term

Hamilton	2nd Monday in September.
Dixie	2nd Monday in August.
Taylor	4th Monday in September.
Madison	2nd Monday in October.
Columbia	4th Monday in October.
Suwannee	2nd Monday in November.
Lafayette	1st Monday in December.

FOURTH JUDICIAL CIRCUIT

JUDGES	Miles W. Lewis (Duval Circuit) Jacksonville. DeWitt T. Gray Jacksonville. Bayard B. Shields, Jacksonville. A. D. McNeill, Jacksonville.
State Attorney	William A. Hallowes III, Jacksonville.
Assistant State Attorney	James H. Bunch, Jacksonville.
Court Reporter	Ralph W. Pattison, Jacksonville.

Spring Term

Clay	1st Tuesday after 1st Monday in April.
Nassau	3rd Monday in April.
Duval	3rd Monday in May.

Fall Term

Clay	2nd Monday in October.
Nassau	4th Monday in October.
Duval	4th Monday in November.

Spring Term

Volusia	2nd Monday in April.
St. Johns	1st Monday in June.
Flagler	3rd Monday in May.
Putnam	2nd Monday in March.

Fall Term

Volusia	3rd Monday in October.
St. Johns	2nd Monday in November.
Flagler	2nd Monday in December.
Putnam	2nd Monday in October.

EIGHTH JUDICIAL CIRCUIT

JUDGES	H. L. Sebring, Gainesville. A. Z. Adkins, Gainesville.
State Attorney	T. E. Duncan, Gainesville.
Assistant State Attorney	J. Hill Williams, Lake Butler.
Court Reporters	J. L. Peek, Starke. Ida Abrams, Gainesville.

Spring Term

Baker	2nd Monday in April.
Gilchrist	3rd Monday in April.
Bradford	4th Monday in April.
Levy	2nd Monday in April.
Union	4th Monday in May.

Fall Term

Baker	2nd Monday in October.
Gilchrist	4th Monday in September.
Bradford	2nd Monday in November.
Levy	3rd Monday in October.
Union	3rd Monday in November.

Summer Term

Alachua	2nd Monday in July.
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Winter Term

Alachua	2nd Monday in January.
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NINTH JUDICIAL CIRCUIT

JUDGES	M. B. Smith, Titusville. Thad Carlton, Ft. Pierce. Frank A. Smith, Orlando.
State Attorney	Murry Overstreet, Kissimmee.
Assistant State Attorneys	Lloyd F. Boyle, Sanford. Angus Sumner, Ft. Pierce.

Court Reporters Miss Mary Fee, Ft. Pierce.
 Jessie D. Kleinman, Titusville.
 Helen W. Curtis, Orlando.

Terms

Seminole 2nd Tuesday after 1st Monday in January.
 Seminole 2nd Tuesday after 1st Monday in April.
 Seminole 2nd Tuesday after 1st Monday in April.
 Seminole 2nd Tuesday after 1st Monday in October.

Spring Term

Orange 3rd Monday in April.
 Osceola 3rd Monday in March.
 Indian River 2nd Tuesday in March.
 St. Lucie 2nd Tuesday in April.
 Okeechobee 2nd Tuesday in February.
 Martin 2nd Tuesday in June.
 Brevard 4th Tuesday in March.

Fall Term

Orange 3rd Monday in October.
 Osceola 3rd Monday in September.
 Indian River 2nd Tuesday in October.
 St. Lucie 2nd Tuesday in November.
 Okeechobee 2nd Tuesday in September.
 Martin 2nd Tuesday in January.
 Brevard 2nd Tuesday in October.

TENTH JUDICIAL CIRCUIT

JUDGES H. C. Petteway, Lakeland.
 D. O. Rogers, Lakeland.
 State Attorney L. Grady Burton, Wauchula.
 Assistant State Attorney Wm. C. Norvell, Lakeland.
 Court Reporters Kate Carver, Lakeland.
 Lucille Rentz, Lakeland.

Spring Term

Hardee 1st Tuesday after the 2nd Monday in February.
 Polk 1st Tuesday after the 2nd Monday in March.
 Highlands 1st Tuesday after the 1st Monday in April.

Fall Term

Hardee 1st Tuesday after the 2nd Monday in September.
 Polk 1st Tuesday after the 2nd Monday in October.
 Highlands 1st Tuesday after the 1st Monday in November.

ELEVENTH JUDICIAL CIRCUIT

JUDGES	Worth W. Trammell, Miami. Paul D. Barns, Miami. Ross Williams, Miami. Arthur Gomez, Key West. Stanley Milledge, Miami. Richard H. Hunt, Miami.
State Attorney	G. A. Worley, Miami.
Assistant State Attorneys	Joseph Otto, Miami. J. Lancelot Lester, Key West.
Court Reporters	J. E. Kelly, Miami. Angelo Caro, Key West.

Spring Term

Dade	2nd Tuesday in May.
Monroe	3rd Monday in April.

Fall Term

Dade	2nd Tuesday in November.
Monroe	3rd Monday in October.

Winter Term

Dade	2nd Tuesday in February.
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TWELFTH JUDICIAL CIRCUIT

JUDGES	Geo. W. Whitehurst, Ft. Myers. W. T. Harrison, Palmetto.
State Attorney	Clyde H. Wilson, Sarasota.
Assistant State Attorneys	W. W. Smiley, Bradenton. Sumter Leitner, Arcadia.
Court Reporters	Edward Ley, Arcadia. Athene Magruder, Bradenton.

Spring Term

Glades	1st Monday in February.
DeSoto	2nd Monday in February.
Hendry	3rd Monday in February.
Collier	1st Monday in March.
Manatee	2nd Monday in March.
Charlotte	4th Monday in March.
Sarasota	1st Monday in April.
Lee	3rd Monday in April.

Fall Term

Glades	1st Monday in September.
DeSoto	2nd Monday in September.
Hendry	3rd Monday in September.
Collier	1st Monday in October.

Manatee	3rd Monday In October.
Charlotte	4th Monday in October.
Sarasota	2nd Monday In November.
Lee	1st Monday in November.

THIRTEENTH JUDICIAL CIRCUIT

JUDGES	L. L. Parks, Tampa.
	Harry N. Sandler, Tampa.
State Attorney	J. Rex Farrior, Tampa.
Assistant State Attorney	J. Frank Umstot, Tampa.
Court Reporter	T. G. Nesbit, Tampa.

Spring Term

Hillsborough	1st Tuesday in April.
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Fall Term

Hillsborough	1st Tuesday in October.
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FOURTEENTH JUDICIAL CIRCUIT

JUDGES	Ira A. Hutchison, Panama City.
	E. C. Welch, Marianna.
State Attorney	L. D. McRae, Chipley.
Assistant State Attorney	H. V. McClellan, Chipley.
Court Reporters	O. C. Speight, Chipley.
	Mary Frances Barrow, Blountstown.

Spring Term

Gulf	4th Monday in February.
Calhoun	4th Monday in April.
Jackson	2nd Monday in May.
Bay	2nd Monday in March.
Washington	4th Monday in March.
Holmes	2nd Monday in April.

Fall Term

Gulf	4th Monday in August.
Calhoun	4th Monday in September.
Jackson	2nd Monday in November.
Bay	2nd Monday in September.
Washington	4th Monday in October.
Holmes	2nd Monday in October.

FIFTEENTH JUDICIAL CIRCUIT

JUDGES	C. E. Chillingworth, West Palm Beach. Geo. W. Tedder, Ft. Lauderdale.
State Attorney	Phil O'Connell, West Palm Beach.
Assistant State Attorney	Louis F. Maire, Ft. Lauderdale.
Court Reporters	J. W. Coleman, Ft. Lauderdale. Alice M. Hayden, West Palm Beach.

Spring Term

Palm Beach	1st Tuesday after 1st Monday in January and March.
Broward	2nd Tuesday in March.

Fall Term

Palm Beach	1st Tuesday after the 1st Monday in June and October.
Broward	2nd Tuesday in October.

V

COUNTIES, COUNTY SEATS AND COUNTY OFFICERS

COUNTY	COUNTY SEAT	CLERK OF CIRCUIT COURT	COUNTY JUDGE	SHERIFF	TAX ASSESSOR	TAX COLLECTOR	SUPERVISOR OF REGISTRATION
Alachua	Gainesville	Geore E. Evans	H. H. McDonald	J. P. Ramsey	J. W. Booth	J. L. Arnow	Howard Bishop
Baker	Macleenny	C. W. Klein, Jr.	Fran'k Dowling	S. R. Green	B. Fran'k Jones	Geo. P. Williams	Wesley Moody
Bay	Panama City	H. A. Pledger	C. S. Russ	John Scott	D. G. McQuagge	A. G. Appelberg	J. B. Mashburn
Bradford	Starke	A. J. Thomas	E. K. Perryman	A. O. Andreu	E. W. Hayes	C. A. Knight	J. F. Hollingsworth
Brevard	Titusville	G. M. Simmons	Vassar B. Carlton	H. T. Williams	M. J. Edwards	H. C. Morgan	W. J. Bailey
Broward	Ft. Lauderdale	E. R. Bennett	Boyd H. Anderson	Walter R. Clark	L. O. Hansen	W. O. Berryhill	Easter L. Gates
Calhoun	Blountstown	J. A. Peacock	Roy S. Gaskin	J. C. Tucker	C. T. Traylor	J. Mack Ayers	Lee Bailey
Charlotte	Punta Gorda	E. H. Scott	L. E. Robinson	Fred Quednau	A. C. Jordan	E. B. Yeager	Mrs. L. V. King
Citrus	Inverness	James E. Connor	Ellis C. May	Chas. S. Dean	Frank Ellison	A. S. King	Gordon Cooper
Clay	Gr. Cove Springs	L. T. Ivey	T. J. Jennings, Jr.	J. P. Hall	Claude Smith	C. L. Saunders	R. R. Dyal
Collier	Everglades	Edmond F. Scott	S. S. Jolley	L. J. Thorp	D. W. McLeod	C. H. Collier	J. G. Grant
Columbia	Lake City	Hugh B. Summers	Archie Buie, Jr.	W. W. Davis	Lonnie Pearce	Alvin C. Hosford	Fred L. Johnson
Dade	Miami	E. B. Leatherman	W. F. Blanton	D. C. Coleman	J. N. Lummus, Jr.	Hayes Wood	Carl Holmer, Jr.
DeSoto	Arcadia	Mary M. Gwynn	Lewis E. Purvis	J. E. Albritton	Kate Carlton	W. M. Noland	Sallie Ivey
Dixie	Cross City	C. C. Copeland	L. G. Gunter	F. L. Anderson	J. I. Taylor	J. R. Roberts	D. E. Butler
Duval	Jacksonville	Elliot W. Butts	Ollie Edmunds	Rex Sweat	Al St. John	Clyde H. Simpson	Emory H. Price
Escambia	Pensacola	Langley Bell	Harvey E. Page	Howard Mayes	W. J. McDavid	Jno. R. Jones	Ben Davis
Flagler	Bunnell	Dale B. Brown	H. A. Eisenbach	W. H. Wells	D. D. Moody	J. F. Mercer	Andrew Thompson
Franklin	Apalachicola	W. P. Dodd	R. M. Witherspoon	W. J. Lovett	F. A. Hoffman	Oscar C. Melvin	Miss Clyde Brown
Gadsden	Quincy	F. F. Morgan	Frank B. Thrower	M. P. Luten	R. L. Green	Clinton Bassett	E. O. Hall
Gilchrist	Trenton	Asa L. Harilee	M. G. Akins	D. W. Deen	A. M. Quincey	J. A. Polk	W. J. Lord
Glades	Moore Haven	Mrs. D. S. Weeks	J. M. Couse	J. J. Wiggins	I. E. Scott	R. D. Yoder	Mrs. Lee Gunn
Gulf	Wewahitchka	J. R. Hunter	J. E. Pridgeon	H. E. Parker	Sam'l. A. Patrick	Edd C. Pridgeon	C. G. Rish
Hamilton	Jasper	Thelma Lewis	Ernest Rutledge	Eddie McGhin	B. F. Leigh	Jesse Milton	Mrs. H. Carpenter
Hardee	Wauchula	R. Clyde Simmons	Clyde Maddox	W. B. Whidden	Mabry Carlton	L. J. Carlton	Mrs. C. J. Curry
Hendry	LaBelle	Wm. T. Hull	R. M. Harris	Bill Maddox	Dennis Small	R. N. Miller	John L. Hall
Hernando	Brooksville	H. C. Mickler	E. S. MacKenzie	Neil F. Law	Sidney F. Dick	J. T. Daniel	Marie E. M. Duren
Highlands	Sebring	H. T. Piety	T. A. McNicholas	E. G. Long	P. G. Gearing	Ruth Bass Hylton	R. X. Droit

Hillsborough	Tampa	Chas. H. Pent	G. H. Cornelius	H. L. Culbreath	W. S. Sparkman	A. H. Schleman	John C. Dekle
Holmes	Bonifay	H. D. Howell	Klien McDonald	W. B. Driver	W. L. Slay	W. R. Faircloth	E. C. Durant
Indian River	Vero Beach	J. Douglas Baker	Otis M. Cobb	William Frick	W. R. Duncan	Troy E. Moody	Geo. T. Tippin
Jackson	Marianna	Doc Grant	D. H. Oswald	W. B. Gause	M. L. Duncan	Leo Sims	Pansy Lee Bruner
Jefferson	Monticello	Clyde H. Sauls	Thos. B. Bird	A. S. Grant	S. C. Walker	R. J. Taylor	Mrs. C. W. Reed
Lafayette	Mayo	Sidney C. Edwards	Guy M. McClain	J. C. Sessions	G. W. Land	F. Mabry Green	Leo Land
Lake	Tavares	Geo. J. Dykes	A. S. Herlong, Jr.	B. A. Cassady	J. Philip Doss	B. A. Williams	Mrs. M. E. Miller
Lee	Ft. Myers	D. T. Farabee	Chas. Wilson Ward	Fred Roberts	John M. Boring	Jas. B. Roberts	Mrs. Tuttle Smith
Leon	Tallahassee	Paul V. Lang	Jas. C. Gwynn	Frank Stoutamire	W. A. Bass	W. Kenneth Collins	Hattie L. Coles
Levy	Bronson	Jack L. Meeks	H. S. Wilson	W. B. Whiddon	Dogan S. Cobb	M. D. Graham	Mrs. J. O. Beauchamp
Liberty	Bristol	W. G. Larkins	R. W. Robertson	J. M. Phillips	Lonnie L. Ferrell	Mary A. Roberts	Mrs. Eva Baker
Madison	Madison	D. F. Burnett, Jr.	J. R. Kelley	Lonnie T. Davis	A. H. Armstrong	E. B. Wilson	A. E. Ragans
Manatee	Bradenton	Iveson Lloyd	S. J. Murphy	C. J. Hutches	James A. Howze	G. E. Johnson	Lendell G. Sharer
Marion	Ocala	Carlyle Ausley	D. R. Smith	Gordon Moorhead	J. E. Thomas	L. R. Bracken	N. C. Perkins
Martin	Stuart	J. R. Pomeroy	Arthur R. Clonts	C. E. Christensen	A. C. Courson	L. C. Kickliter	J. P. Blakeslee
Monroe	Key West	Ross C. Sawyer	Raymond R. Lord	Berlin A. Sawyer	Claude A. Gandolfo	J. C. McMahon	John England
Nassau	Fernandina	T. W. Brown	H. V. Burgess	H. J. Youngblood	S. H. Swearingen	L. A. Klarer	Mrs. Myrtle Winton
Oakaloosa	Crestview	Leron W. Rice	Wilbur F. Osburn	H. I. Enzor	J. H. Vaughan	Cortez L. Campbell	Ingram Helms
Okeechobee	Okeechobee	Roy R. Raulerson	T. W. Conley, Jr.	L. L. Conrad	Robert LaMartin	Mrs. B. Alderman	W. B. Hargraves
Orange	Orlando	C. M. Gay	Victor Hutchins	James Black	J. N. Burden	C. J. Jackson	R. T. Tucker
Osceola	Kissimmee	J. L. Overstreet	J. F. Robinson	Young Tindall	C. L. Bandy	Glenn Ray	Mrs. Iris P. Donegan
Palm Beach	W. Palm Beach	J. Alex Arnette	Rich'd P. Robbins	L. R. Baker	Jas. M. Owens, Jr.	Stetson O Sproul	J. L. Grier
Pasco	Dade City	A. J. Burnside	O. L. Dayton, Jr.	F. L. Bessenger	J. Ed Bryant	Gresham Batchelor	Mrs. Dove Falls
Pinellas	Clearwater	Ray E. Green	Jack F. White	Todd Tucker	C. A. Wilcox	Jay B. Starkey	W. C. Reid
Polk	Bartow	D. H. Sloan, Jr.	C. M. Wiggins	DeWitt Sinclair	John B. White	Ray Clements	Hugh E. Carlton
Putnam	Palatka	W. A. Williams, Jr.	Causey S. Green	D. C. Hayes	Louis E. Tenney	Randall Wells	Miss Jessie Tinsley
St. Johns	St. Augustine	Hiram Faver	Chas. C. Mathis, Jr.	E. E. Boyce	J. R. Hellier	S. C. Middleton	Mrs. T. F. Ellzey
St. Lucie	Ft. Pierce	W. R. Lott	Flem C. Dame	B. R. Brown	E. R. Pierce	Orris Nobles	E. A. Whelan
Santa Rosa	Milton	G. H. Leonard	A. L. Johnson	Joe T. Allen	Eugene Glover	Earl L. Lewis	R. Glenn Gibson
Sarasota	Sarasota	J. R. Peacock	Forrest Chapman	B. D. Pearson	Glover Ashby	C. G. Strohmer	W. T. Dixon
Seminole	Sanford	O. P. Herndon	R. W. Ware	C. M. Hand	S. F. Doudney	Jno. D. Jinkins	W. J. Thigpen
Sumter	Eushnell	Roy Caruthers	J. M. Eaddy	W. T. Coleman	Inman Wheeler	Grady Potter	S. N. Graham, Sr.
Suwannee	Live Oak	J. L. McMullen	J. M. Hearn	Tom M. Henry	Mrs. E. M. Greene	Horry H. Hair, Jr.	D. A. Bonnell
Taylor	Perry	Jas. R. Jackson	Byron Butler	J. H. Parker	A. E. Morgan	Alton C. Hendry	Mrs. Dan Vereen
Union	Lake Butler	C. B. Hayes	J. R. Townsend	John Dekle	Marcus Howard	Ury G. Sapp	Mrs. D. O. Epperson
Volusia	DeLand	I. Walter Hawkins	J. E. Peacock	S. E. Stone	W. Homer Smith	Mrs. C. S. Paul	O. G. Sage
Wakulla	Crawfordville	Gilbert Langston	A. L. Porter	C. S. Allgood	J. H. Ashmore	W. G. Durrance	Tom Harrell
Walton	DeFuniak	R. B. Underwood	Edward Drake	R. E. Gatlin	D. G. Ray	Lewis F. Cawthon	Lewis F. Cawthon
Washington	Chipley	Leon R. Cox	Reeves Bowen	Henry M. Farrior	Elvie G. Yates	A. Alberson	Leonard Gilbert

VI

LETTER OF TRANSMITTAL

STATE OF FLORIDA

ATTORNEY GENERAL'S OFFICE

Tallahassee, Florida, Jan. 1, 1941.

*To His Excellency, Honorable Fred P. Cone,
Governor of Florida:*

SIR:

As required by the constitutional mandate, directing each officer of the Executive Department to make his full report of his official acts, of the receipts and expenditures of his office, and of the requirements of the same, to the Governor at regular periods, or whenever the Governor shall require it, and in compliance with such mandate, as well as in compliance with long established custom in this State by which such reports are made to cover the two calendar years immediately preceding each regular session of the Legislature, I have the honor to submit herewith the Report of this office, covering the period from January 1, 1939, to December 31, 1940.

Respectfully submitted,

GEORGE COUPER GIBBS,

Attorney General.

VII

PERSONAL REPORT OF THE ATTORNEY GENERAL

GENERAL SCOPE OF DUTIES

The Attorney General is required by common law to exercise certain powers and perform a great variety of duties of great public importance in the due and proper administration of our State Government.

The constitutional duties of the Attorney General are prescribed by Section 22 of Article IV of the Constitution as follows:

"The Attorney General shall be the legal adviser of the Governor, and shall perform such other legal duties as may be prescribed by law. He shall be Reporter for the Supreme Court."

There are many statutes pertaining to the duties and powers of the Attorney General and relating to the conduct of the office and the following are quoted as information:

"The Attorney General shall reside at the seat of government, and shall keep his office in a room in the capitol; he shall perform the duties prescribed by the Constitution of this State, and also perform such other duties appropriate to his office, as may from time to time be required of him by law, or by resolution of the Legislature; he shall, on the written requisition of the Governor, Secretary of State, Treasurer, or Comptroller, give his official opinion and legal advice in writing on any matter touching their official duties; he shall appear in and attend to in behalf of the State, all suits or prosecutions, civil or criminal, or in equity, in which the State may be a party, or in any wise interested, in the Supreme Court of the State; he shall appear in and attend to such suits or prosecutions in any other of the courts of the State, or in any courts of any other State, or of the United States; he shall have and perform all powers and duties incident or usual to such office, and he shall make and keep in his office a record of all his official acts and proceedings, containing copies of all his official opinions, reports and correspondence, and also keep and preserve in his office all official letters and communications to him, and cause a registry and index thereof to be made and kept, all of which official papers and records shall be subject to the inspection of the Governor of the State, and to the disposition of the Legislature by act or resolution thereof." (Section 125, Comp. Laws, 1927.)

"In case of the disability of the Attorney General to perform any official duty devolved on him, by reason of interest or otherwise, the Governor or Attorney General of this State may appoint another person to perform such duty in his stead." (Section 126, Comp. Laws, 1927.)

"The Attorney General shall prepare marginal abstracts to the several sections and a general alphabetical index to the entire general acts and resolutions of each session of the Legislature as soon as practicable after the adjournment thereof, also an index to the local acts and an index to each of the journals of the two branches of the Legislature. Such acts and resolutions and forms of proceedings thereunder prepared by the Attorney General shall be published under his direction." (Section 127, Comp. Laws, 1927.)

"It shall be the duty of the Attorney General at the convening of each session of the Legislature of this State, or as soon thereafter as possible, to recommend a person experienced in indexing, to supervise and assist the respective clerks of each branch of the Legislature having such work in hand, in making the index for both journals. His compensation shall be fixed by the Legislature as other attaches and he shall have as many days as the Legislature may designate by resolution after the close of each session for completing and presenting his work for approval by the Attorney General, who is authorized to approve such index if found correct, before the payment shall be made for the extra days allowed after the close of the Legislature." (Section 128, Comp. Laws, 1927.)

"It shall be the duty of the Attorney General to make a written report to the Governor five days before the first day of every session of the Legislature, as to the effect and operation of the acts of the last previous session, the decisions of the court thereon, and referring to the previous legislation on the subject, with such suggestions as in his opinion the public interest may demand, which report shall be laid before the Legislature by the Governor with his first message." (Section 129, Comp. Laws, 1927.)

"It shall be a misdemeanor in office for the Attorney General to take or receive any fee for defending any supposed offender in any of the courts." (Section 130, Comp. Laws, 1927.)

"The Attorney General shall exercise a general superintendence and direction over the several State Attorneys of the several circuits, as to the manner of discharging their respective duties, and whenever requested by the State Attorneys, shall give them his opinion upon any question of law." (Section 131, Comp. Laws, 1927.)

"The Attorney General shall prescribe the time and manner in which regular quarterly reports shall be made to him by State Attorneys, and it shall be their duty to comply with his instructions in this respect." (Section 132, Comp. Laws, 1927.)

"The Clerk of the Supreme Court is hereby directed to deliver to the Attorney General a copy of each volume or part of volume of the decisions of the Supreme Court of Florida, which may be in the care or custody of said Clerk, and which the Attorney General's office may be without, and take the Attorney General's receipt for the same. The Attorney General shall keep the same in his office at the capitol, and each retiring Attorney General shall take the receipt of his successor for the same and file such receipt in the Treasurer's office: Provided, that this shall not authorize the

taking away of any book belonging to the Supreme Court library, kept for the use of said Court." (Section 133, Comp. Laws, 1927.)

"The Attorney General is required to prepare and cause to be printed a sufficient number of copies of fee bills of the various officers of the several counties of this State, and send, or cause to be sent, copies of said fee bills to all county officers in this State. Such officers shall keep posted in a conspicuous place in their office such fee bills, for the information of persons having business with them." (Section 4677, Comp. Laws, 1927.)

In addition to the duties embraced in the foregoing sections of the statutes, other provisions of law make it the duty of the Attorney General to approve the bond of the Comptroller (Sec. 140), of the Shell Fish Commissioner (Sec. 1844), prosecute combinations against Florida meats (Sec. 7076), and investigate and rectify commercial discriminations (Secs. 3940-3943), enjoin violations of the laws regulating commercial feeds stuffs (Sec. 3259), conduct condemnation proceedings on behalf of Board of Commissioners of State Institutions (Sec. 5105) and on behalf of the Adjutant General's office for military purposes (Sec. 2054), approve article of incorporation for cooperative marketing associations (Sec. 6473), examine and pass on statements filed by investment companies (Sec. 5997), bring proceedings to forfeit charters of corporations which violate the laws or fail to comply with mandatory requirements of same (Sec. 7946), enforce the anti-trust laws of the State (Sec. 7946), pass upon revocation of licenses of investment companies (Sec. 6001), bring proceedings to annul franchise of corporations not for profit under certain conditions (Sec. 6505), approve title to real estate in which the State is interested (Sec. 2399), pass upon permits of associations doing business under a declaration of trust (Sec. 7093), represent the State in disbarment proceedings in the Supreme Court (Sec. 4176), pass upon and approve regulations of district drainage boards (Sec. 1494), certify Everglades Drainage District bonds (Sec. 1555), bring proceedings against fair associations for annulment of their charters when laws relating to same are violated (Sec. 6524), prepare and publish copies of opinions of the Supreme Court (Secs. 4713, 1983) and act as reporter for the Supreme Court (Sec. 4714), participate in hearings on prosecutions instituted against violators of pure food and drug laws (Sec. 3201), prepare forms for hunting licenses (Sec. 1898), furnish indexes to laws and journals of the Legislature (Sec. 1933), conduct proceedings against insolvent or defaulting insurance companies (Secs. 6202, 6228), conduct all quo warranto proceedings (Secs. 5446, 8162), act as attorney for the Railroad Commission (Secs. 6720, 6732, 6734, 6747, 6751) although this work is negligible because of a provision for the Railroad Commission to employ special counsel under Section 6732; attend all legal business arising in connection with the laws governing the salt water fishing industry (Sec. 1846), prepare bond of contractor for uniform school books (Secs. 860-861), pass upon legality of and give approval to all investments of school district sinking funds in purchases of bonds (Sec. 736), devise and furnish a form of seal for all the courts of the State (Sec. 4881), bring proceedings for annulment of franchises of social clubs under certain

conditions (Sec. 6505), control and supervise acts of special assistants to the Attorney General who are not part of the Attorney General's office force, being directly responsible to and appointed by the Governor for special work (Secs. 134-135); give special attention to legal proceedings in connection with the sponge fishing industry (Sec. 1886), conduct suits on bonds of State health officer (Sec. 3170), act as legal advisor and attorney for State Plant Board (Sec. 3833), act as legal advisor for State Road Department (Sec. 1639) which has, however, a special attorney who acts for it in ordinary cases; sue to recover fines for doing business without a license (Sec. 7450); conduct prosecutions against defaulting and delinquent surety companies (Sec. 6296), assist in fixing values of securities deposited with State Treasurer by trust companies under the Trust Act (Sec. 6131), enforcement of vital statistics law (Sec. 3293).

"Chapter 14832, Laws of Florida, Acts of 1931, creating the State Racing Commission designates the Attorney General as the official attorney for such Commission," however Chapter 17276, Acts of 1935, empowers the Commission to employ an attorney at salary not to exceed \$3,000 per annum,

ADMINISTRATIVE DUTIES ON BOARDS

The Attorney General is required to perform a great variety of administrative duties as a member of various boards and he is called upon to answer numerous inquiries from State, County and Municipal officers as matters of information and as an aid to bring about uniformity of administration of the law.

The major part of the important business of the State is performed and handled by Boards and Commissions, created by the Constitution and Laws of the State, and this consumes much of the time of the State officials.

The Attorney General is a member of the following Boards and Commissions:

BOARD OF COMMISSIONERS OF STATE INSTITUTIONS

This Board is composed of the Governor and his entire cabinet, which includes the Attorney General (Sec. 17, Art. IV, Constitution).

This Board has the management and control of all the State Institutions, which includes the Florida State Hospital, State Prison Farm, all State convicts, both the industrial School for Boys and the School for Girls and the Home for the Feeble Minded.

The control and management of these institutions places upon this Board innumerable and most important duties.

The Attorney General not only acts as a member of this Board but is also its legal advisor in the various legal and quasi legal questions arising in the management of these large and important institutions.

STATE BOARD OF EDUCATION

This Board is composed of the Governor, Secretary of State, Attorney General, State Treasurer and State Superintendent of Public Instruction. (See Sec. 12, Art. III, Const.)

Upon this Board is imposed the duty of taking charge of and handling all lands of the State held for educational purposes, also to conserve, manage and safely keep the educational funds of the State; and also many other duties in connection with the general education system of the State.

The Attorney General is the legal advisor of this Board, as well as member thereof.

By virtue of Chapter 7376, Acts of 1917 (Sec. 842, C. G. L.), the members of the State Board of Education were constituted as the State Vocational Board, contemplated by Acts of Congress to cooperate with the Federal Board of Vocational Education in the Administration of the Federal Act.

This Board designates the schools at which vocational education in agriculture, the trades and industries shall be taught and also sees to the administration of the provisions of this law.

STATE BOARD OF PARDONS

This Board is composed of the Governor, Secretary of State, Attorney General, Comptroller and Commissioner of Agriculture. (Sec. 12, Art. IV, Const.)

The Constitution gives this Board the power to remit fines and forfeitures, commute punishment, grant pardons in all cases except treason and impeachment.

With an average prison population of about 3,753 for the year 1939, and 3,677 for the year 1940, it can readily be seen that there are many who feel the urge to apply for clemency of some form.

Two regular meetings of this Board are held each year, and during the year 1939 there were 1,501 applications filed with the Board. One hundred and fifty-nine pardons and 48 paroles were granted. During the year 1940 there were 1,744 applications filed with the Board. Two hundred and seventy pardons and 102 paroles were granted. Life, liberty, suffering and anxiety of the applicants, as well as dependents and society in general, are involved and of necessity careful consideration must be and is given each application, and this consumes a great deal of time of each member of the Board.

TRUSTEES OF THE INTERNAL IMPROVEMENT FUND AND
STATE BOARD OF DRAINAGE COMMISSIONERS

These Boards are composed of the same officials, to-wit: The Governor, Attorney General, Comptroller, State Treasurer and Commissioner of Agriculture. (See Sec. 1385 and 1524, respectively, C. G. L.)

The Trustees of the Internal Improvement Fund hold title to and have exclusive management and control of all lands belonging to the State which were acquired by Acts of Congress of March 3, 1845, and September 28, 1850,

which at this time amounts to approximately 1,149,438.23 acres of swamp and overflow land, 2,645.00 acres of Internal Improvement land proper, and an unknown quantity of land owned by the State under its right of sovereignty.

The Attorney General is attorney and counsel for this Board. The legal work by way of foreclosures, drafting of contracts, advice to the Board, etc., is very large in volume, and practically consumes the entire time of one assistant and stenographer.

The law places upon the Board of Drainage Commissioners the duty of establishing a system of canals, drains, levees, dikes and reservoir to drain and reclaim the swamp and overflow lands within the drainage districts.

Much time is consumed by the members of these boards in carrying out the duties imposed upon them relative to the important matters involved.

STATE CANVASSING BOARD

This Board is composed of the Secretary of State, Comptroller and Attorney General. (Sec. 348, C. G. L.) The duties of this Board are to canvass the returns of all general elections for State officers.

FLORIDA SECURITIES COMMISSION

This Commission was created by Chapter 14899, Acts of 1913, Laws of Florida, and is composed of the Comptroller, Treasurer and Attorney General.

This Board is invested with the power of administering the Act and enforcing its provision. The purpose of the Act is the protection, as far as possible, of the investing public in the purchase of securities. The duties of this Board require frequent meetings and consume considerable time in hearings and study and investigation of Domestic and Foreign Corporations, their assets, plans of operation, etc.

STATE BUDGET COMMISSION

This Commission is composed of the Governor, Secretary of State, Comptroller, Treasurer, Attorney General, Commissioner of Agriculture and State Superintendent of Public Instruction. (Sec. 1366, C. G. L., also Chap. 14654, Acts 1931.)

It is the duty of this Commission to make and assemble reports of their own departments and of all other bureaus, divisions, officers, commissions, institutions and other State agencies and thus prepare a State budget to be submitted to the Legislature as a basis for the General Appropriation Bill. This work requires much careful thought and consideration and consumes quite considerable time—many departments and institutions desire to be heard in fairness to their reports and proposed recommendations to be made in the budget.

BOARD OF ADMINISTRATION

Chapter 14486, Laws of Florida, Acts of 1929, provided for a depository of sinking funds and delinquent taxes and other moneys for road and bridge

indebtedness of the counties and special road and bridge districts of the State or otherwise, and also provided for the issuance of refunding bonds by such counties and special road and bridge districts, and provided for the creation of the Board of Administration and the disbursement of such funds to pay such indebtedness, etc.

Section 12 of this Act provided for a Board of Administration, consisting of the Governor as President, the State Comptroller as Secretary and the State Treasurer as Treasurer. The Attorney General is the legal advisor of this Board and has the handling of all litigation in which this Board is a party.

The Board of Administration has become one of the most active boards in the State Government, due to the large amount of bonded obligations existing throughout the entire State, and due to various defaults, readjustments and refunding operations.

The Board meets regularly each week and frequently has special meetings. Its business is of such character that it requires the presence of the Attorney General at these meetings, and there has developed a very large amount of litigation in which the Board of Administration is a party. During the two-year period covered by this report, the Attorney General has handled approximately 400 cases wherein the Board of Administration was a party.

What is commonly known as the Kanner Act, to-wit, Chapter 15891, Laws of Florida, Acts of 1933, places upon the State Board of Administration certain duties relative to the purchase of bonds with the gasoline tax money, and this added greatly to the many duties which had already been placed upon this Board.

In handling the county and various district finances, it frequently appears to be necessary to change investments of certain bonds and to sell and dispose of bonds held for investment at a figure less than par, and it has been suggested in an opinion of the Supreme Court that the proper practice in doing this would be for the Board of Administration to institute suit in chancery and after giving to interested parties due notice, obtain a decree of the chancellor to the effect that the proposed transfer or change in investment would be proper; and thus it is that the burden of litigation resting upon the Attorney General's office in connection with the matters pertaining to the Board of Administration has been greatly increased as these various settlements and adjustments continue to be required to be made for the best interest of the counties and districts.

COMMISSION TO EXAMINE INTO VALIDITY OF STATE WARRANTS

This Commission is composed of three members, the Comptroller, Treasurer and Attorney General. (Sec. 1361, C. G. L.) The duty of this Commission is to pass upon the validity and legality of Comptroller's warrants and the Treasurer's certificates issued prior to July 1, 1871.

STATE SINKING FUND COMMISSION

This Commission is composed of five members—Governor, Secretary of State, Attorney General, State Treasurer and State Superintendent of Public Instruction. (Sec. 1379, C. G. L.)

The control of the sinking fund to retire State debt is vested in this Commission.

BOARD OF ASSESSMENT OF RAILROADS, TELEGRAPH AND
TELEPHONE COMPANIES

This Board is composed of three members—Comptroller, Attorney General and Treasurer. (Sec. 960, C. G. L.)

The Board's duty is to make assessments of the railroad, telegraph and telegraph property in the State. To do this, much data and information have to be gathered, hearings held and most careful consideration and thought given to the matter as well as mature judgment exercised in making these assessments.

STATE SCHOOL BOOK COMMISSION

This Commission is composed of the Governor and his entire cabinet, which includes the Attorney General. (Sec. 852, C. G. L.) It is the duty of this Board to select and adopt a uniform series or system of school books for use in the public schools of the State and to enter into contracts for same with the publishers and to enforce the use of such books.

BOARD FOR FIXING VALUES OF INVESTMENT SECURITIES
OF TRUST COMPANIES

This Board is composed of the Treasurer, Attorney General and Comptroller, and its title indicates the scope of its duties. (Sec. 6131, C. G. L.)

BOARD OF COMMISSIONERS OF OKEECHOBEE FLOOD
CONTROL DISTRICT

The Attorney General is one of the ten members of this Board. The duty of this Board is to establish, construct and maintain canals, levees, dikes, etc., and do the things required by the Act, looking to Flood Control of lands set forth and described in the Act. (Chap. 13711, Acts of 1929.)

DELINQUENT TAX ADJUSTMENT BOARD OF APPEALS

This Board is composed of the Governor, Treasurer and Attorney General. This Board sits as a Board of Appeals in tax appeals provided for in the Act creating the Board. (Chap. 14572, Acts of 1929.)

BOARD FOR SUPERVISION AND REGULATION OF FORMS TO BE USED FOR ASSUMPTION OF RISK BY SURETY COMPANIES

This Board is composed of the Governor, Comptroller, Treasurer and Attorney General, and its title indicates its duties. (Chap. 14489, Acts of 1929.)

STATE BOARD OF CONSERVATION

This Board is composed of the Governor, Secretary of State, the Attorney General, the Comptroller, the State Treasurer, the State Superintendent of Public Instruction, and the Commissioner of Agriculture. (Chap. 16178, Acts 1933.) This Board is vested with various duties and powers. (See Chapters 17008, 17011, 17016, 17131, 17256, and 17268, Acts of 1935.)

STATE HOUSING BOARD

This Board is composed of the Governor of the State, State Treasurer, Attorney General and the Commissioner of Agriculture. (Chap. 16028, Acts 1933.) This Board has many and varied duties as set forth in the Act creating the Board.

Regular weekly meetings of the Trustees of the Internal Improvement Fund, State Board of Education, and Commissioners of State Institutions are held once each week on Wednesdays. The State Board of Pardons holds two regular meetings each year—March and September—and numerous other special meetings for the consideration of emergency matters. The Railroad Assessment Board meets annually. The Florida Security Commission meets two or more times per month and the other boards meet at irregular times, monthly, quarterly, annually or biennially, as called by their respective chairmen—the meetings being called and held as the business of the particular board demands.

OFFICIAL OPINIONS

In accordance and compliance with the Constitution and statutes of the State, I have during the period of this report, upon request of the administrative officers of the Executive Department of the State Government, prepared written opinions covering their official duties and powers, and have advised with them generally when called upon.

As required by law copies of all such opinions are on file in this office and many of them are set out in full in this report for convenient use by all such officers and others who may have an interest in them.

This office has been frequently called upon by other State officers, boards and commissions, such as the State Hotel Commission, State Board of Conservation, State Labor Inspector, State Board of Control, State Board of Health, etc., for opinions and advice covering their powers and duties, and while this office is not expressly required to do so, yet I have at all times

sought to render such advice and furnish such written opinions, feeling that it would be of assistance in the proper interpretation and application of the statutes covering their powers and duties.

Some of these opinions are set forth in this report.

There is a large volume of work done by this office in the nature of consultation with officers wherein legal advice is sought on various questions arising in the different departments. Frequently much time is required in making proper investigation in order that proper advice may be given. Very much time of the Attorney General is thus consumed but from the very nature of the work, no record of it can be made and hence is not incorporated herein.

STATE STATUTES TESTED IN THE SUPREME COURT OF FLORIDA AND IN THE FEDERAL COURTS

A large number of State statutes, and especially revenue producing statutes, have been challenged and attacked by appropriate Court proceedings, both in the State and Federal Courts. A complete table of such cases, showing the present status is incorporated in this report as well as all civil cases generally, other than those above mentioned which have had my attention.

Criminal cases reaching the Supreme Court have all been given proper attention, briefs filed and arguments made, the details of and present status is shown in the scheduled report herein. This also applies to all certiorari and habeas corpus proceedings.

REPORTER FOR THE SUPREME COURT

The Constitution requires the Attorney General to act as reporter for the Supreme Court.

During the two-year period covered by this report, the Attorney General has acted as reporter for Volumes 134, 135, 136, 137, 138, 139, 140, 141, 142 and 143 of the Florida Supreme Court Reports.

All this work is quite exacting and requires the greatest care for it must be accurate. Supplying omitted citations of cases must be done by research and interlineation of the book and page where same may be found—this occurs where the Court cites a case decided at its current term and is at the time unable to give book and page of same.

An Index Digest of the cases of each volume of the reports must be carefully made before it can be printed.

The Court expects the Attorney General to insert in each report a cross index reference of where each case reported may be found in the Southern Reporter—this requirement has been met at all times but it can readily be seen that to supply these references requires much labor and time.

PUBLISHING ACTS AND RESOLUTIONS OF LEGISLATURE

The Acts and resolutions of the Legislature of the State for 1935 have been published with marginal abstracts, as required by law, under the direction of this office.

An index to these laws and an index to the journals of each branch of the Legislature were also prepared under the direction of this office, the index to the journals having been prepared as provided by Section 128 (104) Compiled General Laws, 1927.

EXAMINATION OF ABSTRACTS OF TITLE

Where conveyance of title is made to the State or any of its institutions, the abstracts are submitted to the Attorney General, as well as abstracts covering title to property on which mortgages are deposited with the State Treasurer as securities under the Trust Act. This consumes considerable time as and when these matters are presented.

EXTRADITION MATTERS

It is the fixed policy of the Governor to refer to the Attorney General the application for extradition of fugitives from justice. These applications have to be examined and approved or rejected, and not infrequently hearings are requested and had and written recommendations made to the Governor, all of which require considerable time of either the Attorney General or one of the Assistants.

OFFICE FURNISHINGS AND LIBRARY

Cooperating in the spirit of economy, I have purchased only such small items of furniture as was absolutely necessary and have bought only such books for the library as were necessary in particular cases actually in the office. The continuing series of law books have, of course, been kept up to date.

ADDITIONAL REMARKS BY ATTORNEY GENERAL

During the years 1939-1940, the period covered by this Report, the volume of work handled by this office has greatly increased. Some idea as to the extent of this increase is afforded from a comparison of the number of cases handled during this period and the years 1937-1938. This comparison discloses that there have been 2,250 civil cases and 401 criminal cases during the period covered by this Report, an increase over the previous two-year period of 151 cases. There has been a corresponding increase in requests for legal advice from various State officers and departments requiring numerous conferences and extensive legal research.

During the last year there has been no diminution of the many problems which have arisen in connection with State boards and commissions. This is true also of new statutes dealing with taxation, social welfare and a wide range of subjects. For example, there has been considerable litigation as well as other legal work relating to the collection of estate taxes, a tax which until recently has been expressly prohibited by the Constitution, but which has now become an important source of State revenue.

STATUTE REVISION AND RESEARCH

In my biennial report of January 1, 1939, I recommended that the Legislature provide for a revision of all statutory law for submission to the Legislature of 1941.

It is with pleasure that I report that the 1939 Legislature followed my recommendations and enacted Chapter 19140, which provides for the revision by the Attorney General, and for legislative research, and bill drafting.

In making the selection of the personnel to carry out the provisions of the law, I was greatly assisted by the Law Book Committee and the officers of the Florida Bar Association and with their cooperation I obtained the services of men who, because of past experience, were well qualified for the work. I selected as chief reviser, Lewis H. Tribble, Dean of the College of Law at Stetson University, who resigned from his position on the faculty of that Institution in order to accept the appointment. As first assistant I selected Fred M. Burns, a man of ability in research and pleading. For the junior assistants, I also selected men of ability and training along the lines required for such work.

I wish here to express my appreciation to the Bench and the Bar of the State for the help which they have given me in the matter of this revision.

The work is proceeding satisfactorily and the preliminary edition of the revision will be promptly submitted to the 1941 Legislature as provided by law. Copies will be sent some time before the convening of the Legislature to the members thereof.

Before commencing the revision, Mr. Tribble and Mr. Burns spent some time in Wisconsin and Kentucky, studying revision work as carried on in those States, and they had considerable correspondence with members of the Bench and Bar of the State as to their experience with the present laws and their suggestions for the betterment of such laws. As a result of this, and the intensive study and application to their work given by the entire Revision Department, the great task set before them is being performed efficiently and expeditiously.

To completely carry into effect my recommendations, it is necessary for the Legislature to enact a bill placing the statute revision work on a continuous basis in order that revisers' bills may be prepared, revising and changing our statutes to fit modern conditions and developments.

The Revision Department is also a legislative research bureau, under the Act of the Legislature, and in this capacity it will be of great assistance not only to the members of the Legislature and to this office, but to the citizens of the State. In order to make this department, as a research bureau, more efficient, there should be established a legislative reference library. Any legislator or citizen desiring the complete history of any legislation may obtain through such legislative bureau complete and detailed data, as to the number of session laws passed on the subject, the first time such law appeared in the statutes, its historical background, and the action, if any, of other States along similar lines, and related statutes.

Heretofore the Attorney General and his staff have drafted bills for individual members of the Legislature. If the revision work is placed on a permanent basis, bill-drafting duties will be assigned to the members of the revision personnel who, because of the experience they are now gaining and their specific training, will make this service more efficient and satisfactory. Legislators may avail themselves of the expert services of such a staff for the purposes of bill drafting or research on legislative matters.

If a bill is enacted by the 1941 Legislature placing the revision work on a permanent basis, and I strongly recommend such action, outmoded law will be eliminated; the statutes will be continuously improved; there will be better legislation and fewer law suits for the purpose of interpreting the statutory law; all the general statutes will be contained in one volume and the annotations in one volume; and, I believe that the State will be enabled to sell both volumes for a price not exceeding \$15.00, thus placing the laws and annotations in reach of all.

Heretofore the laws of various bureaus and departments of this government especially affecting such bureau or department, have been separately compiled and printed. There will be no necessity for this in the future, as the Revision Department can, in pamphlet, or bound, form, provide, at cost, copies of the laws respecting such bureau or department. This will bring about a certainty of the inclusion of all laws and a uniformity in their presentation. I am sure, also, that it will greatly reduce the cost of production of these pamphlets.

Before closing this Report, I wish to pay tribute to the personnel of the Office of the Attorney General. As I have stated before, my predecessor had assembled an efficient and capable staff. This staff, except as it has been reduced by voluntary resignations, has remained. They have performed their duties satisfactorily, efficiently and with a high sense of their responsibility to the State.

It is fitting before leaving this office, at the expiration of my term, that I acknowledge with deep appreciation your consideration and confidence and that of my fellow members of the Cabinet, the members of the Legislature, the Judiciary, the State Attorneys and other prosecuting officers of the State, and the officials, Boards, and Commissions of the State and Federal governments, the counties and the municipalities, which have made our work easier and more effective.

I bespeak for my successor, the Honorable J. Tom Watson, the same kindly consideration which I have enjoyed.

With best wishes for the continued progress of our State and success for you and all others who have or will have the honor to serve it.

Respectfully,

GEORGE COUPER GIBBS,

Attorney General.

VIII

APPROPRIATIONS AND EXPENDITURES

Attorney General

Salaries

APPROPRIATIONS

Balance January 1, 1939.....	\$ 30,349.64	
Appropriation July 1, 1939, to July 1, 1941.....	140,000.00	
Total		\$170,349.64

EXPENDITURES

SALARIES

January 1, 1939, to July 1, 1939.....	\$ 30,039.06	
Amount Reverted June 30, 1939.....	310.58	
July 1, 1939, to January 1, 1941.....	93,744.86	
Total		\$124,094.50
Balance January 1, 1941.....		\$ 46,255.14

NECESSARY AND REGULAR EXPENSE

Attorney General

APPROPRIATIONS

Balance January 1, 1939.....	\$ 12,096.24
Appropriation July 1, 1939, to July 1, 1941.....	24,000.00
Total	\$ 36,096.24

EXPENDITURES

January 1, 1939, to January 1, 1941.....	\$ 18,785.99
(These expenditures cover office equipment, law books, editing and indexing Supreme Court Reports, telephone, telegrams, stationery, stamps, traveling expenses of the Attorney General and Assistants, when on business directly affecting the office, subscriptions to all legal publications, office supplies, and printing the Attorney General's Report and Suggestions to the Legislature.)	
Amount reverted July 1, 1940.....	1,593.41
Outstanding bills January 1, 1941.....	2,988.81
Total	\$ 23,368.21
Balance January 1, 1941.....	\$ 12,728.03

APPROPRIATIONS

STATUTORY REVISION DEPARTMENT SALARIES AND NECESSARY
AND REGULAR

July 1, 1939, to July 1, 1940.....	\$ 20,000.00
July 1, 1940, to July 1, 1941.....	20,000.00
Total	\$ 40,000.00

EXPENDITURES

SALARIES

July 1, 1939, to January 1, 1941.....	\$ 27,227.48
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NECESSARY AND REGULAR

July 1, 1939, to January 1, 1941.....	2,078.06
Amount Reverted July 1, 1940.....	5.00
Outstanding Bills January 1, 1941.....	2,739.51
Total	\$ 30,050.03
Balance January 1, 1941.....	\$ 9,949.97

IX
COMPILED STATEMENT OF ALL CASES
HANDLED FROM JANUARY, 1939,
TO JANUARY, 1941

CIVIL

Number of cases pending January 1, 1939.....	1,093
Number of cases docketed from Jan. 1, 1939, to Jan. 1, 1941.....	1,157
Total	2,250
Number of cases disposed of from Jan. 1, 1939, to Jan. 1, 1941.....	1,922
Total pending January 1, 1941.....	328

CRIMINAL

Number of cases pending January 1, 1939.....	137
Number of cases docketed from Jan. 1, 1939, to Jan. 1, 1941.....	264
Total	401
Number of cases disposed of from Jan. 1, 1939, to Jan. 1, 1941.....	351
Total pending January 1, 1941.....	50

STATEMENT SHOWING COMPARISON OF CASES HANDLED
FOR A SIX-YEAR PERIOD

	1935-1936	1937-1938	1939-1940
Civil Cases.....	1,136	1,987	2,250
Criminal Cases.....	388	562	401
Totals	1,524	2,499	2,651

X

REPORTS OF STATE ATTORNEYS FOR YEARS 1939-1940 UNDER SECTION 132 C. G. L.

FIRST JUDICIAL CIRCUIT

Escambia County
Okaloosa County

Santa Rosa County
Walton County

ESCAMBIA:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	2	7	1
Second Degree	4	—	—
Rape	—	3	—
Assaults:			
With Intent to Commit Felony.....	1	—	—
Perjury	1	—	—
Misconduct of Officers	—	2	—
Adultery, Fornication, etc.	3	—	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Election Law Violations	4	3	2

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Bond Validation Proceedings	8	—
Criminal Hearings Attended	18	—

Respectfully submitted,

E. DIXIE BEGGS, JR.,

State Attorney.

OKALOOSA:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	—	3	—
Second Degree	1	—	—
Manslaughter	2	1	1

Robbery :			
Armed	7	1	—
Assaults :			
With intent to Commit Felony.....	9	4	—
Other Assaults	1	1	—
Arson and Kindred Offenses.....	1	1	—
Burglary and Kindred Offenses	11	8	2
Larceny :			
Of Automobiles	—	1	—
Of Cattle	19	10	4
Kindred Offenses	2	1	—
Embezzlement	2	1	—
False Pretenses and Kindred Offenses..	2	4	—
Forgery, Counterfeiting and Kindred			
Offenses	4	1	—
Trespasses, Injuring Buildings, etc.	1	—	1
Perjury	1	—	—
Resisting Arrest, etc.	1	1	—
Adultery, Fornication, etc.	6	3	1
Desertion and Withholding Suport			
from Wife and Children	4	11	—
Miscellaneous Crimes Not Otherwise			
Enumerated :			
Election Law Violations	—	2	—
Injuring Cattle	1	2	—
Shooting into Dwelling	1	—	—
Driving while Drunk and			
Injuring Person	1	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Bond Estreuture Proceedings	6	—
Criminal Hearings Attended	10	—
Other Cases Not Enumerated		Nuisances
Handled by State Attorney.....	4	Enjoined

Respectfully submitted,

E. DIXIE BEGGS, JR.,

State Attorney.

SANTA ROSA :

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide :			
First Degree	2	3	—
Manslaughter	1	1	—

Robbery:			
Armed	2	—	—
Unarmed	1	—	—
Assaults:			
With intent to Commit Felony.....	12	7	1
Other Assaults	5	6	—
Libel and Defamation.....	—	1	—
Arson and Kindred Offenses	1	—	1
Burglary and Kindred Offenses	17	4	1
Larceny:			
Of Cattle	5	3	3
Kindred Offenses	2	—	1
False Pretenses and Kindred Offenses..	9	5	—
Forgery, Counterfeiting and			
Kindred Offenses	1	—	—
Trespasses, Injuring Buildings, etc.	12	—	4
Perjury	1	—	—
Adultery, Fornication, etc.	4	5	—
Incest	—	2	—
Crime Against Nature	1	—	—
Desertion and Withholding Support			
from Wife and Children	4	10	—
Miscellaneous Crimes Not Otherwise			
Enumerated:			
Election Law Violations	2	—	—
Hit and Run Drivers	1	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	4	—
Bond Estreature Proceedings	4	—
Criminal Hearings Attended	12	—
Habeas Corpus Hearings Attended	6	—
Other Cases Not Enumerated Handled by State		Nuisances
Attorney	2	Enjoined

Respectfully submitted,
 E. DIXIE BEGGS, JR.,
 State Attorney.

WALTON:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	1	1	—
Manslaughter	1	2	—
Rape	1	2	—

Robbery:			
Armed	3	2	—
False Imprisonment and Kidnaping.....	2	—	—
Assaults:			
With intent to Commit Felony.....	23	8	4
Other Assaults	5	12	—
Arson and Kindred Offenses.....	2	2	—
Burglary and Kindred Offenses.....	25	10	—
Larceny:			
Of Automobiles	7	2	—
Of Cattle	2	3	1
Kindred Offenses	4	—	—
Embezzlement	3	1	2
False Pretenses and Kindred Offenses..	—	11	—
Forgery, Counterfeiting and Kindred Offenses	6	—	—
Trespasses, Injuring Buildings, etc.	11	6	—
Perjury	1	—	—
Resisting Arrest, etc.	—	2	—
Conspiracy	—	2	—
Adultery, Fornication, etc.	10	9	1
Bigamy	1	—	—
Miscegenation	2	—	1
Crime Against Nature	1	—	—
Desertion and Withholding Support from Wife and Children	8	7	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Election Law Violations	—	3	—
Injuring Cattle	—	4	—
Shooting into Dwelling	—	1	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	7	—
Bond Validation Proceedings.....	1	—
Bond Estreature Proceedings.....	5	—
Habeas Corpus Hearings Attended.....	2	—
Other Cases Not Enumerated Handled by State Attorney	4	Nuisances Enjoined

Respectfully submitted,

E. DIXIE BEGGS, JR.,

State Attorney.

SECOND JUDICIAL CIRCUIT

Franklin County
Gadsden County
Jefferson County

Leon County
Liberty County
Wakulla County

FRANKLIN:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	4	1	1
Second Degree	2	—	—
Manslaughter	—	1	—
Assaults:			
With Intent to Commit Felony.....	8	3	2
Other Assaults	6	1	—
Burglary and Kindred Offenses.....	31	4	3
Larceny:			
Of Automobiles	1	—	—
Of Cattle	3	1	—
Kindred Offenses	2	—	—
Forgery, Counterfeiting and Kindred Offenses	2	1	—
Perjury	3	1	1
Resisting Arrest, etc.	1	—	—
Incest	1	—	—
Desertion and Withholding Support from Wife and Children.....	9	—	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Selling Property Subject to Lien....	1	—	—
Aiding Prisoner to Escape.....	2	—	—
Contempt of Court.....	1	—	—
Burning Woods	3	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Criminal Hearings Attended.....	27	—

Respectfully submitted,

O. C. PARKER, JR.,

State Attorney.

GADSDEN:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	3	1	—

Second Degree	1	—	—
Manslaughter	9	2	1
Robbery:			
Armed	3	—	—
Unarmed	3	1	—
Assaults:			
With Intent to Commit Felony.....	15	4	2
Arson and Kindred Offenses.....	2	—	—
Burglary and Kindred Offenses.....	35	9	4
Larceny:			
Of Automobiles	4	1	—
Of Cattle and Hogs	23	3	3
Kindred Offenses	4	—	—
Embezzlement	3	1	—
False Pretenses and Kindred Offenses..	6	—	—
Forgery, Counterfeiting and Kindred			
Offenses	13	5	2
Perjury	3	—	—
Incest	2	—	—
Crime Against Nature.....	2	—	—
Desertion and Withholding Support			
from Wife and Children.....	22	5	4
Miscellaneous Crimes Not Otherwise			
Enumerated:			
Keeping House of Ill Fame.....	2	—	—
Malicious Destruction of Property	4	—	—
Receiving Stolen Property.....	2	—	—
Selling Personal Property Subject			
to Lien	2	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	3	—
Bond Estreature Proceedings.....	2	—
Criminal Hearings Attended.....	28	—

Respectfully submitted,

O. C. PARKER, JR.,

State Attorney.

JEFFERSON:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	2	2	—
Manslaughter	2	1	1

Assaults:

With Intent to Commit Felony.....	13	3	1
Other Assaults	2	—	—
Burglary and Kindred Offenses.....	25	4	7
Larceny:			
Of Cattle	1	—	—
Kindred Offenses	2	—	1
Forgery, Counterfeiting and Kindred Offenses	2	—	1
Bigamy	1	—	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Cutting Fence	2	—	1
Shooting into Dwelling.....	1	—	—
Malicious Mischief	1	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Bond Estreature Proceedings.....	6	—
Criminal Hearings Attended.....	20	—

Respectfully submitted,

O. C. PARKER, JR.,

State Attorney.

LEON:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	6	3	1
Second Degree	7	3	1
Manslaughter	5	2	1
Robbery:			
Armed	1	—	—
Unarmed	3	1	—
Assaults:			
With Intent to Commit Felony.....	26	5	7
Other Assaults	5	2	—
Arson and Kindred Offenses.....	2	—	—
Burglary and Kindred Offenses.....	93	15	12
Larceny:			
Of Automobiles	9	2	—
Of Cattle	30	4	2
Kindred Offenses	29	3	—
Embezzlement:			
Public Officers	7	1	—
Other Kinds	5	2	—

False Pretenses and Kindred Offenses.....	3	—	—
Forgery, Counterfeiting and Kindred Offenses	30	5	2
Bigamy	2	—	—
Crime Against Nature.....	3	—	—
Desertion and Withholding Support from Wife and Children.....	23	7	6
Miscellaneous Crimes Not Otherwise Enumerated:			
House of Ill Fame.....	4	4	—
Operating Motor Vehicle without License	11	—	—
Lewd and Lascivious Association Unmarried People	3	—	—
Culpable Negligence	4	—	—
Hit and Run Drivers.....	5	—	—
Possession Morphine	1	—	—
Practicing Medicine without License	3	—	—
Moving Personal Property Subject to Lien	2	—	—
Contempt of Court.....	3	—	—
Impersonating Officer	2	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	5	—
Bond Validation Proceedings.....	5	—
Bond Estreature Proceedings	12	—
Criminal Hearings Attended.....	95	—
Habeas Corpus Hearings Attended.....	10	—
Other Cases Not Enumerated Handled by State At- torney	25	—

Respectfully submitted,
O. C. PARKER, JR.,
State Attorney.

LIBERTY:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Robbery:			
Armed	1	1	—
Unarmed	1	—	—
Assaults:			
With Intent to Commit Felony.....	3	—	1
Other Assaults	2	2	1

Arson and Kindred Offenses	4	1	—
Burglary and Kindred Offenses.....	1	—	—
Larceny:			
Of Automobiles	1	1	—
Of Cattle	2	—	1
Kindred Offenses	1	—	—
Forgery, Counterfeiting and Kindred Offenses	6	2	—
Resisting Arrest, etc.	3	1	1
Desertion and Withholding Support from Wife and Children.....	3	2	1
Miscellaneous Crimes Not Otherwise Enumerated:			
Selling Personal Property Subject to Lien	2	—	—
Obstructing R. R. Track.....	1	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Criminal Hearings Attended.....	12	—

Respectfully submitted,

O. C. PARKER, JR.,

State Attorney.

WAKULLA:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
Second Degree	1	—	—
Manslaughter	—	1	—
Robbery:			
Armed	1	—	—
Unarmed	—	1	—
Assaults:			
With Intent to Commit Felony.....	5	2	—
Other Assaults	11	5	2
Burglary and Kindred Offenses.....	8	2	1
Larceny:			
Of Automobile	2	—	—
Of Cattle	4	1	1
Kindred Offenses	5	1	—
False Pretenses and Kindred Offenses..	1	—	—
Forgery, Counterfeiting and Kindred Offenses	2	1	1
Offenses Against Public Revenue.....	2	1	—
Perjury	1	—	—

Desertion and Withholding Support from Wife and Children.....	10	4	2
Miscellaneous Crimes Not Otherwise Enumerated:			
Sexual Intercourse Unmarried Fe- male Under 18	1	—	—
Stop Netting	1	—	—
Driving Drunk	5	1	—
Practicing Medicine without License	2	1	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Criminal Hearings Attended.....	18	—

Respectfully submitted,
O. C. PARKER, JR.,
State Attorney.

THIRD JUDICIAL CIRCUIT

Columbia County	Madison County
Dixie County	Suwannee County
Hamilton County	Taylor County
Lafayette County	

COLUMBIA :

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	6	—	—
Manslaughter	1	2	1
Rape	—	2	—
Robbery:			
Armed	3	—	—
Assaults:			
With Intent to Commit Felony.....	3	1	—
Other Assaults	3	1	—
Burglary and Kindred Offenses.....	5	2	—
Larceny:			
Of Automobiles	5	—	—
Of Cattle	12	4	3
Kindred Offenses	4	5	—
Embezzlement	2	2	—
False Pretenses and Kindred Offenses..	1	—	—
Forgery, Counterfeiting and Kindred Offenses	3	—	1

Trespasses, Injuring Buildings, etc.	—	3	—
Desertion and Withholding Support from Wife and Children	11	—	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Disbarment of Attorney	1	—	—
Unlawful Operation of Motor Ve- hicle without Proper Certificate.....	1	—	—
Hit and Run Driver.....	1	—	—
Reckless Operation of Auto.....	—	1	—
Unlawfully Killing Animals of An- other	—	11	—
Receiving Stolen Property.....	3	1	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Criminal Hearings Attended	5	—
Habeas Corpus Hearings Attended.....	4	—
Other Cases Not Enumerated Handled by State Attorney	18	—

Respectfully submitted,

A. K. BLACK,
State Attorney.

DIXIE:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	4	—	—
Rape	2	1	1
Assaults:			
With Intent to Commit Felony.....	11	5	—
Arson and Kindred Offenses.....	3	—	1
Burglary and Kindred Offenses.....	5	2	—
Larceny:			
Of Automobiles	3	1	—
Of Cattle	2	—	—
Kindred Offenses	10	11	—
Embezzlement:			
Public Officers	1	—	—
Other Kinds	2	5	—
False Pretenses and Kindred Offenses..	1	—	—
Forgery, Counterfeiting and Kindred Offenses	3	2	—
Trespasses, Injuring Buildings, etc.	10	—	—
Misconduct by Officers	1	—	—

Resisting Arrest	3	—	2
Bigamy	—	1	—
Desertion and Withholding Support from Wife and Children.....	9	2	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Violations of Sponge Laws	2	—	—
Keeping a Gambling House	4	4	—
Hit and Run Driver	1	—	—
Maintaining a Nuisance	2	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition Judgments entered
Bond Estreature Proceedings	5	—
Criminal Hearings Attended	5	—
Habeas Corpus Hearings Attended.....	4	—
Other Cases Not Enumerated Handled by State At- torney	20	—

Respectfully submitted,

A. K. BLACK,

State Attorney.

HAMILTON:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	4	—	1
Manslaughter	1	—	—
Rape	1	—	—
Robbery:			
Armed	2	—	—
Unarmed	—	1	—
Assaults:			
With Intent to Commit Felony.....	9	3	—
Burglary and Kindred Offenses.....	8	3	—
Larceny:			
Of Automobiles	2	1	—
Of Cattle	3	—	1
Kindred Offenses	6	5	2
Forgery, Counterfeiting and Kindred Offenses	2	2	—
Trespasses, Injuring Buildings, Etc.	2	—	—
Adultery, Fornication, etc.	3	—	—
Violation Liquor Law, Second Offense	1	—	—

Desertion and Withholding Support from Wife and Children	5	1	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Violation Liquor Law, 1st Offense	3	2	—
Keeping Gambling House	1	—	—
Compounding the Offense of Petit Larceny	1	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Bond Validation Proceedings	1	Denied
Bond Estreature Proceedings	5	—
Other Cases Not Enumerated Handled by State At- torney	12	—

Respectfully submitted,

A. K. BLACK,

State Attorney.

LAFAYETTE:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	*1	—	—
Assaults:			
With Intent to Commit Felony.....	2	1	—
Burglary and Kindred Offenses.....	—	1	—
Larceny:			
Of Cattle	1	—	—
Kindred Offenses	3	1	—
Trespasses, Injuring Buildings, etc.	2	—	—
Perjury	—	1	—
Adultery, Fornication, etc.	—	1	—
Bigamy	1	—	—
Desertion and Withholding Support from Wife and Children	5	—	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Exhibiting Obscene Prints	—	1	—
Practicing as a Physician Without a License	1	—	—

*Murder in first degree case transferred from Dixie County, Florida.

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Habeas Corpus Hearings Attended.....	1	—
Other Cases Not Enumerated Handled by State Attorney	6	—

Respectfully submitted,
A. K. BLACK,
State Attorney.

MADISON:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	2	—	—
Manslaughter	1	1	—
Rape	1	—	—
Robbery:			
Unarmed	—	1	—
Assaults:			
With Intent to Commit Felony	9	7	1
Burglary and Kindred Offenses	4	4	—
Larceny:			
Of Automobiles	2	3	—
Of Cattle	1	—	—
Kindred Offenses	4	2	—
False Pretenses and Kindred Offenses..	2	—	—
Forgery, Counterfeiting and Kindred Offenses	5	—	—
Trespasses, Injuring Buildings, etc.	—	2	—
Desertion and Withholding Support from Wife and Children.....	4	5	1
Miscellaneous Crimes Not Otherwise * Enumerated:			
Disposing Property Subject to Lien	1	4	—
Unlawful Maiming of Animals.....	1	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Bond Estreature Proceedings	6	—
Criminal Hearings Attended	3	—
Habeas Corpus Hearings Attended	4	—
Other Cases Not Enumerated Handled by State Attorney	20	—

Respectfully submitted,
A. K. BLACK,
State Attorney.

SUWANNEE:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	7	1	1
Manslaughter	3	—	—
Mayhem	1	—	—
Rape	1	—	—
Robbery:			
Armed	1	—	—
False Imprisonment and Kidnaping.....	—	1	—
Assaults:			
With Intent to Commit Felony.....	3	5	2
Other Assaults	1	—	—
Burglary and Kindred Offenses.....	11	5	—
Larceny:			
Of Automobiles	2	1	—
Of Cattle	6	5	2
Kindred Offenses	8	6	—
Embezzlement	2	—	—
False Pretenses and Kindred Offenses..	9	2	—
Forgery, Counterfeiting and Kindred Offenses	4	—	—
Trespasses, Injuring Buildings, etc.	2	1	—
Perjury	2	—	—
Conspiracy	2	—	—
Violation Liquor Law, Second Offense	3	1	1
Desertion and Withholding Support from Wife and Children	7	—	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Keeping Gambling House	2	—	—
Violation of Narcotic Laws	1	—	—
Aiding Prisoner to Escape	2	—	—
Violation of Election Laws	5	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	1	Affirmed
Bond Estreature Proceedings	13	Judgments entered
Criminal Hearings Attended	5	—

Other Cases Not Enumerated Handled by State Attorney 15 Completed

Respectfully Submitted,
A. K. BLACK,
State Attorney.

TAYLOR:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	2	—	—
Manslaughter	3	—	—
Assaults:			
With Intent to Commit Felony.....	6	6	—
Arson and Kindred Offenses.....	—	1	—
Burglary and Kindred Offenses	4	—	—
Larceny:			
Of Automobiles	1	—	—
Kindred Offenses	14	9	5
Embezzlement:			
Public Officers	1	—	—
False Pretenses and Kindred Offenses..	2	—	—
Trespasses, Injuring Buildings, etc.	2	—	—
Adultery, Fornication, etc.	3	—	—
Crime Against Nature	3	—	—
Violation Liquor Law, Second Offense..	3	—	—
Desertion and Withholding Support from Wife and Children.....	3	—	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Removing Car Unlawfully.....	2	—	—
House Ill Fame.....	2	—	—
Fraudulent Marking Cattle.....	1	—	—
Unlawful Killing Animals.....	1	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Bond Estreature Proceedings.....	4	—
Criminal Hearings Attended.....	3	—
Other Cases Not Enumerated Handled by State At- torney	15	—

Respectfully submitted,
A. K. BLACK,
State Attorney.

FOURTH JUDICIAL CIRCUIT

Clay County

Duval County

Nassau County

CLAY:

	Indictments Returned by Grand Jury & Informations	No Bills Returned by Grand Jury or State Attorney	Verdicts of Not Guilty Returned
Homicide:			
First Degree	3	—	—
Manslaughter	3	—	2
Assaults:			
With Intent to Commit Felony.....	4	1	—
Arson and Kindred Offenses.....	1	—	—
Burglary and Kindred Offenses.....	5	—	—
Larceny:			
Of Cattle	3	—	—
Kindred Offenses	1	1	—
Forgery, Counterfeiting and Kindred Offenses	2	—	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Destruction of Personal Property....	1	—	1
Carnal Intercourse, etc.	1	—	—
Operating Vehicle without License	1	—	—
Bastardy Proceedings	1	—	—
Shooting Cow	1	1	—
Shooting into Dwelling	1	—	—
Selling Securities without Being Registered	1	(Disposed of in Sup. Court)	

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	1	—
Criminal Hearings Attended.....	17	—
Habeas Corpus Hearings Attended.....	6	—
Restoration of Sanity Proceedings.....	4	—

Respectfully submitted,

WILLIAM A. HALLOWES, III,

State Attorney.

DUVAL:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	28	11	3
Second Degree	19	(Certified to Criminal Court)	
Manslaughter	5	(Certified to Criminal Court)	
Rape	5	—	3
Assaults:			
With Intent to Commit Felony....	2	(Certified to Criminal Court)	
Perjury	2	(Certified to Criminal Court)	
Miscellaneous Crimes Not Otherwise Enumerated:			
Bastardy Proceedings	9	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	7	—
Bond Validation Proceedings.....	11	—
Bond Estreasure Proceedings.....	125—(about)	—
Criminal Hearings Attended—Inquests.....	102	—
Habeas Corpus Hearings Attended.....	32	—
Other Cases Not Enumerated Handled by State At- torney, Including Restoration to Sanity Hearings	29	—

Respectfully submitted,

WILLIAM A. HALLOWES, III,

State Attorney.

NASSAU:

	Indictments Returned by Grand Jury & Informations	No Bills Returned by Grand Jury or State Attorney	Verdicts of Not Guilty Returned
Homicide:			
First Degree	4	3	1
Second Degree	2	—	—
Manslaughter	2	—	1
Robbery:			
Armed	2	—	—
Unarmed	1	—	—
Assaults:			
With Intent to Commit Felony.....	4	—	1
Arson and Kindred Offenses.....	1	1	—
Burglary and Kindred Offenses.....	8	—	1

Larceny:

Of Automobiles	8	—	—
Kindred Offenses	4	1	1
Embezzlement	1	—	—
False Pretenses and Kindred Offenses..	1	—	—
Forgery, Counterfeiting and Kindred Offenses	1	—	—
Violation Liquor Law.....	1	—	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Hit and Run	1	—	—
Aiding Prisoner to Escape.....	1	1	—
Destruction of Personal Property..	2	—	1
Shrimping in Inside Waters.....	1	—	—
Operating Vehicle without License	2	1	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Bond Validation Proceedings.....	4	—
Bond Estreature Proceedings.....	2	—
Criminal Hearings Attended.....	24	—
Habeas Corpus Hearings Attended.....	3	—

Respectfully submitted,

WILLIAM A. HALLOWES, III.

State Attorney.

FIFTH JUDICIAL CIRCUIT

Citrus County
Hernando County
Lake County

Marion County
Sumter County

CITRUS:

	Indictments Returned by Grand Jury & Informa- tions filed State Atty.	No Bills Returned by Grand Jury or no Informations filed by State Atty.	Verdicts of Not Guilty Returned
Homicide:			
First Degree	12	—	—
Manslaughter	2	—	—
Assaults:			
With Intent to Commit Felony.....	2	—	—
Burglary and Kindred Offenses.....	24	—	—

Larceny:			
Of Cattle & Hog.....	14	—	2
Kindred Offenses	10	—	—
Embezzlement	2	—	—
Forgery, Counterfeiting and Kindred Offenses	2	—	—
Trespasses, Injuring Buildings, etc.	4	—	—
Offenses Against Public Revenue.....	4	—	—
Perjury	8	—	—
Resisting Arrest, etc.	2	—	—
Desertion and Withholding Support from Wife and Children.....	4	—	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Illegal Use of Title "Doctor".....	8	—	—
Violation R. R. Com. Act.....	2	—	—
Hit and Run Driver.....	2	—	—
Receiving Stolen Goods.....	2	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

(None)

Respectfully submitted,

J. W. HUNTER,

State Attorney.

HERNANDO:

	Indictments Returned by Grand Jury & Informa- tions filed State Atty.	No Bills Returned by Grand Jury or no Informations filed by State Atty.	Verdicts of Not Guilty Returned
Homicide:			
Manslaughter	2	—	1
Rape	—	1	—
Robbery:			
Armed	1	—	—
Assaults:			
With Intent to Commit Felony.....	3	—	—
Arson and Kindred Offenses.....	2	—	1
Burglary and Kindred Offenses.....	8	1	—
Larceny:			
Of Cattle	8	—	2
Kindred Offenses	6	—	—
Violation Liquor Law, Second Offense	3	—	—

Miscellaneous Crimes Not Otherwise

Enumerated:

Illegal Voting in Primary.....	7	—	—
Issuing Worthless Check.....	1	—	—
Violating Fishing Law	4	—	—
Hit and Run Driver.....	2	—	1

OTHER CASES HANDLED BY STATE ATTORNEYS

(None)

Respectfully submitted,

J. W. HUNTER,

State Attorney.

LAKE:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned	Nolle Prossed
Homicide:				
First Degree	9	2	—	—
Rape	—	1	—	—
Robbery:				
Armed	1	—	—	1
Unarmed	1	1	—	—
Assaults:				
With Intent to Com- mit Felony	28	12	2	6
Other Assaults	4	—	—	—
Burglary & Kindred Of- fenses	25	5	3	5
Larceny:				
Of Automobiles	4	3	—	—
Of Cattle	1	—	—	—
Kindred Offenses	10	5	1	3 —
Embezzlement	4	1	—	—
False Pretenses and Kin- dred Offenses	1	2	—	—
Forgery, Counterfeiting & Kindred Offenses	6	2	—	1
Offenses Against Public Revenue	—	1	—	—
Perjury	—	2	—	—
Adultery, Fornication, etc.	3	4	—	—
Crime Against Nature.....	1	—	—	—

Desertion & Withholding Support from Wife and Children	16	2	—	—
Miscellaneous Crimes Not Otherwise Enumerated:				
Manufacturing Liquor Without a License.....	2	—	—	—
Sale of Liquor on Sunday	2	—	—	2
Hit & Run Driving.....	2	—	—	2
Bolita, Lottery and Gambling	12	—	2	3
Removal of Property under Lien	—	3	—	1

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Bond Validation Proceedings.....	26	(All Validated)

Respectfully submitted,

J. W. HUNTER,

State Attorney.

MARION:

	Indictments Returned by Grand Jury & Informa- tions filed State Atty.	No Bills Returned by Grand Jury or no Informations filed by State Atty.	Verdicts of Not Guilty Returned
Homicide:			
First Degree	16	3	—
Manslaughter	2	2	—
Robbery:			
Armed	4	—	—
Assaults:			
With Intent to Commit Felony.....	19	—	3
Other Assaults	6	2	—
Burglary and Kindred Offenses.....	39	2	1
Larceny:			
Of Automobiles	8	—	—
Of Cattle	4	—	2
Kindred Offenses	14	2	—
Embezzlement	3	—	—
Forgery, Counterfeiting and Kindred Offenses	11	2	—

Trespasses, Injuring Buildings, etc.	8	1	—
Offenses Against Public Revenue.....	15	—	1
Adultery, Fornication, etc.	5	—	—
Incest	1	—	1
Desertion and Withholding Support from Wife and Children.....	10	—	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Hit and Run Driver.....	3	2	—
Receiving Stolen Goods.....	3	—	1
Lottery	3	—	—
Violation R. R. Com. Act.....	10	—	—
Practicing Dentistry without Lic....	1	—	—
Unlawfully Concealing and Mort- gaging Property Subject to Lien....	3	—	—
Escape	1	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

(None)

Respectfully submitted,

J. W. HUNTER,

State Attorney.

SUMTER:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	2	1	—
Rape	1	3	—
Assaults:			
With Intent to Commit Felony.....	12	4	2
Burglary and Kindred Offenses.....	17	2	1
Larceny:			
Of Automobiles	3	—	—
Of Cattle	11	1	—
Kindred Offenses	3	2	—
Embezzlement:			
Public Officers	1	—	1
Other Kinds	1	—	1
Forgery, Counterfeiting and Kindred Offenses	4	—	—
Resisting Arrest, etc.	1	—	—
Desertion and Withholding Support from Wife and Children.....	2	—	—

Miscellaneous Crimes Not Otherwise

Enumerated:

Maiming a Cow	1	—	1
---------------------	---	---	---

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Bond Validation Proceedings.....	4	—
Bond Estreature Proceedings.....	3	Pending

Respectfully submitted,

J. W. HUNTER,

State Attorney.

SIXTH JUDICIAL CIRCUIT

Pasco County

Pinellas County

PASCO:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	2	1	—
Manslaughter	1	—	1
Robbery:			
Armed	2	—	1
Assaults:			
With Intent to Commit Felony.....	2	—	1
Arson and Kindred Offenses.....	2	—	—
Burglary and Kindred Offenses.....	22	—	—
Larceny:			
Of Automobiles	2	—	—
Of Cattle	1	—	—
Kindred Offenses	8	—	4
Embezzlement	1	—	—
Forgery, Counterfeiting and Kindred Offenses	3	—	1
Trespasses, Injuring Buildings, etc.	2	—	—
Adultery, Fornication, etc.	2	—	—
Crime Against Nature.....	2	—	—
Desertion and Withholding Support from Wife and Children.....	4	—	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Bastardy	1	—	—
Violating Narcotic Law	1	—	—
Possessing Lottery Tickets	1	—	—

Possessing Obscene Pictures	1	—	—
Bond Estreatures	5	—	—
Cases investigated and dismissed by State Attorney or sent to County Court	24	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Criminal Hearings Attended.....	32	—

Respectfully submitted,
CHESTER B. McMULLEN,
State Attorney.

PINELLAS:

	Indictments Returned by Grand Jury & Informa- tions Filed	No Bills Returned by * Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	9	—	1
Second Degree	3	—	2
Manslaughter	8	—	1
Mayhem	1	—	—
Robbery:			
Attempted	1	—	—
Armed	1	—	—
Unarmed	7	—	—
Assaults:			
All Kinds	9	—	1
Attempted Arson and Kindred Offenses	2	—	4
Burglary and Kindred Offenses.....	71	—	4
Larceny:			
Of Automobiles	14	—	1
Of Cattle	1	—	1
Kindred Offenses	22	—	1
Embezzlement	7	—	—
False Pretenses and Kindred Offenses..	4	—	1
Forgery, Counterfeiting and Kindred Offenses	22	—	—
Perjury	1	—	—
Adultery, Fornication, etc.	1	—	—
Bigamy	1	—	—
Crime Against Nature	2	—	—
Violation Liquor Law, Second Offense..	11	—	3

*Two No-Bills returned by Grand Jury for years 1939-1940.

Desertion and Withholding Support from Wife and Children.....	21	—	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Keeping and Maintaining Gaming Apparatus for Purpose of Gaming or Gambling	3	—	1
Violation Uniform Securities Act..	2	—	—
Violation Narcotic Law.....	4	—	—
Sale of Lottery Ticket.....	4	—	—
Carnal Intercourse	2	—	2
Buying & Receiving Stolen Prop- erty	4	—	—
Passing Worthless Check.....	1	—	—
Conveying Tools into Jail to Aid Escape	1	—	—
Forgery & Uttering Forged Instru- ment	7	—	—
Possession of Burglarious Tools....	1	—	1
Disbarment Proceedings	2	—	—
Extortion	1	—	—
Bastardy	3	—	—
Disposing of Personal Property Under Lien	1	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Appeals from Lower Court to Circuit Court	9	1 dismissed; 8 pending
Bond Validation Proceedings.....	25	25 validated
Bond Estreature Proceedings.....	17	5 reinstated; 5 cancelled; 2 judgments; 1 motion to vacate judgment; 4 notice to bondsmen; 8 ordered discharged.
Criminal Hearings Attended.....	73	—
Habeas Corpus Hearings Attended	28	—

Respectfully submitted,

CHESTER B. McMULLEN,

State Attorney.

SEVENTH JUDICIAL CIRCUIT

Flagler County
Putnam County

St. Johns County
Volusia County

FLAGLER: (Not Reported.)

PUTNAM: (Not Reported.)

ST. JOHNS: (Not Reported.)

VOLUSIA:

	Information Returned by State Atty or Indictments Returned by Grand Jury	No Inf. or No Bills Returned by Grand Jury or St. Atty.	Verdicts of Not Guilty Returned
Homicide:			
First Degree	6 Indicts.	4	1
Second Degree	2	1	—
Manslaughter	2	1	—
Rape	2	1	—
Robbery:			
Armed	5	—	—
Unarmed	4	—	—
Assaults:			
With Intent to Commit Felony.....	12	9	1
Other Assaults	4	2	—
Burglary and Kindred Offenses.....	28	15	2
Larceny:			
Of Automobiles	5	3	—
Grand Larceny	11	7	—
Kindred Offenses	15	—	—
Embezzlement:			
Public Officers	3	—	—
Other Kinds	4	4	—
False Pretenses and Kindred Offenses..	15	1	—
Forgery, Counterfeiting and Kindred Offenses	13	—	—
Misconduct by Officers	8	—	—
Bigamy	—	1	—
Desertion and Withholding Support from Wife and Children.....	2	5	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Bastardy	5	—	—
Receiving Stolen Property	8	—	—
Culpable Injury	2	—	—
Wanton Killing of Cow	1	1	—

Removing Property under Lien.....	6	4	—
Obtaining Property False Pretenses	3	1	—
Concealing Stolen Property.....	1	4	—
Operating a Gambling House	—	1	—
Leaving Scene of Accident.....	—	1	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	113	—
Bond Validation Proceedings.....	26	—
Bond Estreature Proceedings.....	11	—
Criminal Hearings Attended and Investigations.....	52	—
Habeas Corpus Hearings Attended.....	43	—

Respectfully submitted,
MURRAY SAMS,
State Attorney.

EIGHTH JUDICIAL CIRCUIT

SEE THIS REPORT ON PAGE 110

NINTH JUDICIAL CIRCUIT

Brevard County	Orange County
Indian River County	Osceola County
Martin County	Saint Lucie County
Okeechobee County	Seminole County

BREVARD:

	Informations or Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	2	1	1
Second Degree	1	—	—
Manslaughter	2	—	—
Robbery:			
Armed	1	—	—
Unarmed	2	—	—
Assaults:			
With Intent to Commit Felony.....	5	—	—
Other Assaults	2	—	—
Burglary and Kindred Offenses.....	20	—	2
Larceny:			
Of Automobiles	4	—	—
Kindred Offenses (Grand)	5	—	—

Embezzlement	2	—	—
False Pretenses and Kindred Offenses..	1	—	—
Forgery, Counterfeiting and Kindred Offenses	8	—	—
Trespasses, Injuring Buildings, etc.....	2	—	—
Adultery, Fornication, etc.	1	—	—
Desertion and Withholding Support from Wife and Children.....	1	—	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Operating Motor Vehicle Without Proper Certificate	1	—	—
Unlawful Removal of Personal Property	2	—	—
Violation of Hit and Run Law.....	2	—	—
Disposing Personal Property under Lien	1	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	2	Dismissed
Criminal Hearings Attended.....	27	—
Habeas Corpus Hearings Attended.....	1	—

Respectfully submitted,

MURRAY W. OVERSTREET,

State Attorney.

INDIAN RIVER:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	1	—	—
Second Degree	2	—	—
Robbery:			
Armed	2	1	—
Assaults:			
With Intent to Commit Felony.....	7	1	2
Arson and Kindred Offenses.....	—	1	—
Burglary and Kindred Offenses.....	15	3	2
Larceny:			
Of Automobiles	1	—	—
Forgery, Counterfeiting and Kindred Offenses	3	—	—
Trespasses, Injuring Buildings, etc.	2	—	1
Resisting Arrest, etc.	1	—	—

Miscellaneous Crimes Not Otherwise

Enumerated:

Conducting Lottery 1 — —

False Imprisonment 1 — —

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Bond Estreature Proceedings.....	1	—

Respectfully submitted,

MURRAY W. OVERSTREET,

State Attorney.

OKEECHOBEE:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
Third Degree	—	1	—
Manslaughter	1	—	—
Burglary and Kindred Offenses.....	10	2	—
Larceny:			
Kindred Offenses	2	—	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Conducting a Lottery	1	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

(None)

Respectfully submitted,

MURRAY W. OVERSTREET,

State Attorney.

ORANGE:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	5	—	1
Second Degree	3	—	—
Manslaughter	1	—	—
Rape	1	1	—

OTHER CASES HANDLED BY STATE ATTORNEYS

(None)

Respectfully submitted,

MURRAY W. OVERSTREET,

State Attorney.

OSCEOLA:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	2	—	—
Second Degree	1	1	—
Manslaughter	1	—	—
Accessory	1	—	1
Rape	2	2	—
Robbery:			
Armed	3	—	—
Assaults:			
All Kinds	2	—	—
Arson and Kindred Offenses.....	1	1	—
Burglary and Kindred Offenses.....	12	—	1
Larceny:			
Grand Larceny	1	—	1
Of Automobiles	1	—	—
Of Cattle	1	—	—
Kindred Offenses	1	—	—
Forgery, Counterfeiting and Kindred Offenses	7	—	—
Resisting Arrest, etc.	1	—	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Violation of Law Regulating Mar- riage Licenses	1	—	Nolle Prosequi

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	1	Undisposed of
Bond Validation Proceedings.....	21	—
Criminal Hearings Attended.....	14	—
Habeas Corpus Hearings Attended.....	12	—
Other Cases Not Enumerated Handled by State Attorney:		
Petition to Restore Sanity.....	13	—
Collecting Florida State Hospital Claims and Representing Insane Persons in Suits.....	14	—
Investigating "Fifth Column" Activities & Other Investigations	56	—

Respectfully submitted,

MURRAY W. OVERSTREET,

State Attorney.

MARTIN:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
Manslaughter	1	—	—
Robbery:			
Armed	—	—	1
Assaults:			
With Intent to Commit Felony.....	4	—	—
Burglary and Kindred Offenses.....	8	—	—
Larceny:			
Of Automobiles	1	—	—
Kindred Offenses	1	—	—
Forgery, Counterfeiting and Kindred Offenses	4	—	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Conducting Lottery	2	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Habeas Corpus Hearings Attended.....	3	Remanded

Respectfully submitted,

MURRAY W. OVERSTREET,

State Attorney.

SEMINOLE:

	Informations or Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	3	3	1
Second Degree	3	—	—
Manslaughter	2	—	—
Robbery:			
Armed	2	—	—
Assaults:			
With Intent to Commit Felony	5	—	1
Other Assaults	2	—	—
Burglary and Kindred Offenses	29	—	2
Larceny:			
Of Automobiles	7	—	2
Of Cattle, Hogs	2	—	—
Kindred Offenses (Grand)	5	—	—
False Pretenses and Kindred Offenses..	2	—	—

Forgery, Counterfeiting and Kindred Offenses	6	—	—
Perjury	1	—	—
Desertion and Withholding Support from Wife and Children.....	3	—	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Shooting into Dwelling House	1	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	2	1 dismissed
Bond Validation Proceedings.....	2	Validated
Criminal Hearings Attended.....	32	—
Habeas Corpus Hearings Attended.....	4	—

Respectfully submitted,

MURRAY W. OVERSTREET,

State Attorney.

ST. LUCIE:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	3	—	1
Manslaughter	2	2	—
Mayhem	2	—	—
Robbery:			
Armed	3	—	—
Unarmed	1	—	—
Assaults:			
With Intent to Commit Felony.....	7	3	1
Sending Threatening Communications..	1	—	—
Burglary and Kindred Offenses.....	20	5	2
Larceny:			
Of Automobiles	1	—	—
Of Cattle	1	—	—
Kindred Offenses	6	3	—
Embezzlement	1	—	—
False Pretenses and Kindred Offenses..	1	—	—
Forgery, Counterfeiting and Kindred Offenses	1	—	—
Trespasses, Injuring Buildings, etc.	1	—	—
Adultery, Fornication, etc.	1	—	—

Crime Against Nature	1	—	—
Desertion and Withholding Support from Wife and Children	3	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Habeas Corpus Proceedings Attended.....	5	—

Respectfully submitted,

MURRAY W. OVERSTREET,

State Attorney.

TENTH JUDICIAL CIRCUIT

Hardee County

Polk County

Highlands County

HARDEE:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
Second Degree	1	—	—
Robbery:			
Unarmed	3	—	—
Assaults:			
All Kinds	9	—	—
Burglary and Kindred Offenses.....	19	—	—
Larceny:			
Of Cattle	5	—	—
Kindred Offenses	4	—	—
Embezzlement	1	—	—
Forgery, Counterfeiting and Kindred Offenses	8	—	—
Adultery, Fornication, etc.	1	—	—
Desertion and Withholding Support from Wife and Children	4	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	1	—
Bond Validation Proceedings.....	3	—
Bond Estreature Proceedings.....	2	—
Habeas Corpus Hearings Attended.....	4	—

Respectfully submitted,

L. GRADY BURTON,

State Attorney.

HIGHLANDS:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	4	—	2
Manslaughter	2	—	—
Robbery:			
Armed	1	—	—
Assaults:			
With Intent to Commit Felony.....	10	—	2
Other Assaults	19	—	4
Arson and Kindred Offenses.....	3	—	1
Burglary and Kindred Offenses.....	25	—	2
Larceny:			
Of Automobiles	5	—	—
Of Cattle	3	—	—
Kindred Offenses	3	—	—
Embezzlement:			
Public Officers	10	—	—
Other Kinds	1	—	—
Forgery, Counterfeiting and Kindred Offenses	4	—	—
Perjury	1	—	—
Resisting Arrest, etc.	2	—	1
Desertion and Withholding Support from Wife and Children.....	1	—	1
Miscellaneous Crimes Not Otherwise Enumerated:			
Lottery	9	—	—
Removing Mortgaged Property.....	1	—	—
Hit and Run	1	—	—
Prison Escape	4	—	—

Respectfully submitted,

L. GRADY BURTON,

State Attorney.

POLK:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	23	6	3
Rape	1	2	—
Misconduct by Officers.....	8	(Transferred to Criminal Court of Record)	

OTHER CASES HANDLED BY STATE ATTORNEYS

Appeals from Lower Court to Circuit Court.....	46	—
Bond Validation Proceedings.....	16	—
Criminal Hearings Attended.....	25	(No exact record kept)
Habeas Corpus Hearings Attended.....	11	—

Respectfully submitted,
L. GRADY BURTON,
State Attorney.

ELEVENTH JUDICIAL CIRCUIT

Dade County

Monroe County

DADE AND MONROE:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury
Homicide:		
First Degree	45	10
Second Degree	4	—
Manslaughter	5	—
Rape	5	4
Embezzlement	3	—
Perjury	2	—

	Cases Prosecuted	Convictions	Acquittals	Nol Pros.
First Degree Murder.....	35	27	11	1
Rape	5	3	2	—

	No. of Cases
Homicides Investigated and Referred to County Solicitors (Not Presented to Grand Jury):	
Murder in Second Degree and Manslaughter.....	12
Miscellaneous Cases	2
Statutory Rape	1
Murder and Rape Cases Awaiting Action of Grand Jury.....	6

	No. Prisoners
Prisoners in County Jail Charged with Capital Crime where In- quest of Preliminary Hearing Has Not Been Held: up to January 9, 1941.....	9

	Amount
Monies Collected and Turned Over to State Comptroller (Fred P. Cone v. Geo. McCall, et al.).....	\$13,165.79

	No. of Cases
Investigation of:	
Assaults	10
Accidental Deaths Other than Automobile Accidents.....	24

Deaths from Natural Causes.....	68
Suicides	88
Alleged Rape	12
Justifiable Homicides	36
Assault with Deadly Weapon.....	23
Murder-Suicide Cases	3
Miscellaneous Investigations	11
Capital Cases where Accused Has Been Indicted by Grand Jury but Not Apprehended.....	8
Murder Cases Awaiting Trial.....	2
Homicides by Unknown.....	8
Extradition Proceedings	3
Disbarment Proceedings	1
Inquests and Preliminary Hearings Attended.....	100
Witnesses Subpoenaed before State Attorney.....	413
Witnesses Subpoenaed before Grand Jury.....	700
Injunction Suits Filed and Prosecuted.....	5
Bond Validation Proceedings.....	10
Appeals from Lower Court to Circuit Court.....	39
Bond Estreatures	34
Habeas Corpus Hearings	279
Restoration of Sanity Hearings.....	22
Total Number of Criminal Cases Investigated During 1939 and 1940	382

Respectfully submitted,
G. A. WORLEY
State Attorney.

TWELFTH JUDICIAL CIRCUIT

Charlotte County	Hendry County
Collier County	Lee County
DeSoto County	Manatee County
Glades County	Sarasota County

CHARLOTTE:

	Indictments Returned by Grand Jury or Informa- tions Filed	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Robbery:			
Armed	1	—	—
Assaults:			
With Intent to Commit Felony.....	5	—	1
Miscellaneous Crimes Not Otherwise Enumerated:			
Stop netting case.....	1	—	—
Breaking and Entering	1	—	—

Operating Automobile Under In-
fluence of Liquor, Causing Acci-
dent 1 — —

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	1	—
Bond Validation Proceedings	2	—
Criminal Hearings Attended	8	—
Other Cases Not Enumerated Handled by State At- torney	12	—

Respectfully submitted,
CLYDE H. WILSON,
State Attorney.

COLLIER:

	Indictments Returned by Grand Jury or Informa- tions Filed	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	1	—	—
Second Degree	1	—	—
Manslaughter	1	—	1
Assaults:			
With Intent to Commit Felony.....	2	—	—
Other Assaults	5	—	—
Larceny:			
Of Automobiles	1	—	—
Kindred Offenses	1	—	1
False Pretenses and Kindred Offenses..	1	—	—
Adultery, Fornication, etc.	1	—	—
Miscegenation	2	—	—
Desertion and Withholding Support from Wife and Children.....	1	—	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Breaking and Entering	1	—	—
Mullet Closed Season.....	12	—	2
Carnal Intercourse with Unmar- ried Female Under 18 Years Age..	1	—	1

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Bond Estreature Proceedings	1	—
Habeas Corpus Hearings Attended.....	1	—

Respectfully submitted,
CLYDE H. WILSON,
State Attorney.

DE SOTO:

	Indictments Returned by Grand Jury or Informa- tions Filed	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	1	—	1
Rape	1	—	—
Robbery:			
Armed	2	—	—
Assaults:			
With Intent to Commit Felony.....	6	—	—
Larceny:			
All Kinds	3	—	—
Forgery, Counterfeiting and Kindred Offenses	4	—	—
Desertion and Withholding Support from Wife and Children.....	1	—	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Concealing Stolen Goods.....	1	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	3	All Affirmed
Bond Validation Proceedings.....	1	—
Habeas Corpus Hearings Attended.....	6	1 Granted, 5 Affirmed

Respectfully submitted,

CLYDE H. WILSON,

State Attorney.

GLADES:

	Indictments Returned by Grand Jury or Informa- tions Filed	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
Second Degree	1	—	—
Manslaughter	2	—	—
Assaults:			
With Intent to Commit Felony.....	2	—	—
Other Assaults	2	—	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Accessory to a Murder.....	1	—	1

Breaking and Entering	1	—	—
Unlawful Intercourse with Female under 18 Years of Age.....	1	—	—
Entering without Breaking.....	5	—	—
Possession of Mullet Out of Sea- son	1	—	—

Respectfully submitted,

CLYDE H. WILSON,

State Attorney.

HENDRY:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
Second Degree	3	—	—
Assaults:			
With Intent to Commit Felony.....	8	—	1
Burglary and Kindred Offenses.....	4	—	—
Larceny:			
Of Cattle	1	—	—
Embezzlement:			
Public Officers	4	—	—
False Pretenses and Kindred Offenses..	2	—	1
Resisting Arrest, etc.	2	—	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Lottery Violations	4	—	—
Worthless Check	1	—	—
Slot Machine Violations.....	3	—	—
Selling Property Subject to Lien..	1	—	—
Maliciously Injuring Animals of Another	2	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Bond Validation Proceedings.....	2	—
Bond Estreature Proceedings.....	1	—
Criminal Hearings Attended.....	8	—
Other Cases Not Enumerated Handled by State At- torney	4	—

Respectfully submitted,

CLYDE H. WILSON,

State Attorney.

LEE:

	Indictments Returned by Grand Jury or Informa- tions Filed	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	5	—	—
Second Degree	2	—	—
Robbery:			
Armed	4	—	1
Assaults:			
With Intent to Commit Felony.....	15	—	1
Arson and Kindred Offenses.....	5	—	1
Larceny:			
Of Automobiles	1	—	—
Of Cattle	1	—	—
Kindred Offenses	5	—	—
Embezzlement:			
Public Officers	2	—	—
Other Kinds	1	—	1
Forgery, Counterfeiting and Kindred Offenses	19	—	—
Perjury	1	—	1
Resisting Arrest, etc.	2	—	—
Crime Against Nature	1	—	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Breaking and Entering.....	24	—	1
Obtaining Property under False Pretense	3	—	—
Lottery Violation	1	—	—
Maliciously Shooting into Dwelling	1	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	1	—
Bond Validation Proceedings.....	4	—
Criminal Hearings Attended.....	18	—
Habeas Corpus Hearings Attended.....	7	—
Other Cases Not Enumerated Handled by State At- torney	16	—

Respectfully submitted,

CLYDE H. WILSON,

State Attorney.

MANATEE:

	Indictments Returned by Grand Jury or Informa- tions Filed	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	4	1	—
Second Degree	2	—	—
Manslaughter	1	—	—
Robbery:			
Armed	2	—	—
Assaults:			
With Intent to Commit Felony.....	5	—	—
Burglary and Kindred Offenses.....	8	—	—
Larceny:			
Of Automobiles	4	—	—
Of Cattle	2	—	—
Kindred Offenses	6	—	1
Embezzlement:			
Public Officers	2	2	1
False Pretenses and Kindred Offenses..	1	—	1
Forgery, Counterfeiting and Kindred Offenses	1	—	1
Resisting Arrest, etc.	1	—	—
Adultery, Fornication, etc.	2	—	—
Incest	1	—	—
Desertion and Withholding Support from Wife and Children.....	6	—	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Accessory Before the Fact.....	2	—	—
Lottery Violations	14	—	—
Breaking and Entering.....	13	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	3	—
Bond Validation Proceedings.....	4	—
Bond Estreature Proceedings.....	1	—
Criminal Hearings Attended.....	26	—
Habeas Corpus Hearings Attended.....	6	—
Other Cases Not Enumerated Handled by State At- torney	7	—

Respectfully submitted,
 CLYDE H. WILSON,
 State Attorney.

SARASOTA :

	Indictments Returned by Grand Jury or Informa- tions Filed	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide :			
First Degree	3	1	—
Second Degree	1	—	—
Manslaughter	3	—	1
Robbery :			
Unarmed	5	—	—
Assaults :			
With Intent to Commit Felony.....	4	—	—
Sending Threatening Communications..	1	—	—
Burglary and Kindred Offenses.....	1	—	—
Larceny :			
Of Automobiles	7	—	—
Of Cattle	4	1	1
Kindred Offenses	12	—	1
Forgery, Counterfeiting and Kindred Offenses	10	—	1
Bigamy	1	—	—
Desertion and Withholding Support from Wife and Children.....	1	—	—
Miscellaneous Crimes Not Otherwise Enumerated :			
Breaking and Entering.....	12	—	—
Obtaining Property under False Pretense	1	—	1

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	4	—
Bond Validation Proceedings.....	6	—
Bond Estreuture Proceedings.....	1	—
Habeas Corpus Hearings Attended.....	8	—
Other Cases Not Enumerated Handled by State At- torney	14	—

Respectfully submitted,

CLYDE H. WILSON,

State Attorney.

THIRTEENTH JUDICIAL CIRCUIT

HILLSBOROUGH COUNTY:

- | | | |
|--------------------------------|-------------|------------------------------|
| A. Grand Jury | Indictments | No True Bills |
| 1. Rape | 5 | 1 |
| 2. Homicide, First Degree..... | 27 | 2 |
| Second Degree | 4 | Cert. to Crim. Ct. of Record |
3. *Justice of Peace Courts.* The Grand Jury spent a large amount of time during the period of this report in investigating and reporting upon fees, costs, expenses and other circumstances surrounding the functioning of the five Justice of Peace Courts and Districts in this County, and was a vital factor in the final action, along with the newspapers, citizens and County Commissioners, who became interested by virtue of the Grand Jury investigation and reports, resulting in doing away with two Justice of Peace Districts, reducing the number from five to three.
4. *Gambling.* The Grand Jury, during this period, spent a great deal of time in investigating gambling and conditions resulting therefrom. While they returned no indictments, specific reports were made and the evidence in several cases turned over to the County Solicitor for further action. Also, they turned over to the State Attorney all data which formed the basis of seven injunctions filed by the undersigned State Attorney against gambling houses.
5. *Elections.* The Grand Jury spent much time investigating in advance of the 1939 City elections and in advance of the 1940 State and County primaries, rumors of frauds which were alleged to have been anticipated, or attempted, including all questions concerning the selection and appointment of election officials. They also investigated any reports immediately after each election, and after the 1940 primaries turned over facts to the County Solicitor, which resulted in the prosecution of some six or eight persons for disturbances around several of the polling places.
6. *Miscellaneous.* (a) *Jook Joints.* The Grand Jury spent much time in investigating "jook joints" and surrounding conditions, reporting upon the same and co-operating with the local officers in restricting the evils connected with their operation.
- (b) The Grand Jury, from time to time, investigated and reported their findings upon County institutions and other matters affecting the general welfare of the community.

B. Trials

	Verdicts:	Guilty	Not Guilty	Nolle Pros.	Pending
1. Murder		20	3	—	4
2. Rape		4	1	—	—

3. The State Attorney filed 7 injunctions against 7 different alleged gambling houses, one of these cases, *State v. Roiz, et al.*, was prosecuted to completion in which the Circuit Court ruled against the State on a question of law interpreting Sec. 7832, C. G. L. 1927. The State Attorney has perfected an appeal to the Supreme Court of Florida in this case.
 4. An injunction case against Herbert E. Marvin for violation of the Florida Securities Act was successfully terminated by an order directing a permanent injunction against the defendant in the Circuit Court of this Circuit.
 5. *Appeals from the Criminal Court of Record to the Circuit Court.* Nine appeals were disposed of, all favorable to the State. There were pending on December 31, 1940, approximately 20 appeals.
- C. Preliminary Hearings Attended:
1. Bastardy, 6; 2. Murder, 8; 3. Rape, 1; 4. Coroner's Inquests, 6.
- D. Investigations not included above in which the testimony, recorded and transcribed, established justifiable homicide, suicide or death by natural causes; and in case of rape and bastardy, evidence and circumstances did not warrant further prosecution: 1. Homicide, 42; 2. Rape, 10; 3. Bastardy, 40.
- E. Other cases concluded, not shown above: 1. Habeas Corpus, 25; 2. Restoration to Sanity, 28.

Respectfully submitted,

J. REX FARRIOR,

State Attorney.

FOURTEENTH JUDICIAL CIRCUIT

Bay County
Calhoun County
Gulf County

Holmes County
Jackson County
Washington County

BAY:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	4	4	—
Second Degree	5	—	5
Rape	—	2	—
Assaults:			
With Intent to Commit Felony.....	2	—	—
Other Assaults	4	—	—
Arson and Kindred Offenses.....	1	2	—
Burglary and Kindred Offenses.....	23	—	2

Larceny:			
Of Automobiles	3	1	—
Of Cattle	7	—	2
Kindred Offenses	—	3	—
Embezzlement	2	—	—
False Pretenses and Kindred Offenses..	2	—	—
Forgery, Counterfeiting and Kindred			
Offenses	8	—	1
Perjury	1	—	1
Resisting Arrest, etc.	1	1	—
Adultery, Fornication, etc.	2	—	—
Incest	1	—	—
Desertion and Withholding Support			
from Wife and Children.....	17	3	—
Miscellaneous Crimes Not Otherwise			
Enumerated:			
Unlawful Operation of Auto.....	1	—	—
Violating Election Laws.....	1	1	—
Unlawful Sexual Intrecourse.....	4	—	1
Hit and Run Driving	2	—	—
Removing Property Subject to Lien	3	—	—
Running Gambling House.....	1	—	1
Violating Traffic Laws.....	1	—	—
Buggery	1	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Criminal Hearings Attended (Preliminary Hearings)	17	—

Respectfully submitted,

L. D. McRAE,

State Attorney.

CALHOUN:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	2	1	—
Robbery:			
Armed	1	—	—
Assaults:			
With Intent to Commit Felony.....	10	—	3
Other Assaults	5	2	—
Burglary and Kindred Offenses.....	2	1	—

Larceny:			
Of Cattle	1	—	—
Kindred Offenses	9	2	3
Embezzlement:			
Public Officers	1	—	1
Forgery, Counterfeiting and Kindred			
Offenses	3	—	—
Trespasses, Injuring Buildings, etc.	1	—	1
Conspiracy	1	—	—
Adultery, Fornication, etc.	3	—	3
Desertion and Withholding Support			
from Wife and Children.....	5	2	—
Miscellaneous Crimes Not Otherwise			
Enumerated:			
Cutting Fence of Another.....	1	—	—
Shooting into a Dwelling House....	1	—	—
Shooting into Occupied Auto.....	1	—	1
Buggery	1	—	1

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Bond Validation Proceedings.....	1	—
Habeas Corpus Hearings Attended (Preliminary)....	25	—

Respectfully submitted,

L. D. McRAE,

State Attorney.

GULF:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	1	—	1
Second Degree	4	—	2
Manslaughter	1	—	—
Rape	1	—	—
Assaults:			
With Intent to Commit Felony.....	—	3	—
Other Assaults	5	1	—
Burglary and Kindred Offenses.....	3	1	1
Larceny:			
Of Automobiles	2	—	—
Kindred Offenses	6	—	2
Forgery, Counterfeiting and Kindred			
Offenses	2	—	—
Trespasses, Injuring Buildings, etc.	1	—	—

Adultery, Fornication, etc.	—	1	—
Incest	—	1	—
Desertion and Withholding Support from Wife and Children.....	4	1	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Hit and Run Driving	1	—	1

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	2	—
Criminal Hearings Attended (Preliminary Hearings)	15	—

Respectfully submitted,

L. D. McRAE,

State Attorney.

HOLMES:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	3	—	—
Second Degree	3	1	1
Manslaughter	1	—	—
Rape	1	—	—
Assaults:			
With Intent to Commit Felony.....	7	2	1
Burglary and Kindred Offenses.....	5	—	—
Larceny:			
Of Automobiles	2	—	—
Of Cattle	10	1	2
Kindred Offenses	5	—	—
Forgery, Counterfeiting and Kindred Offenses	4	—	—
Trespasses, Injuring Buildings, etc.	2	1	—
Incest	1	—	—
Desertion and Withholding Support from Wife and Children.....	2	—	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Disposing of Mortgaged Property..	5	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Criminal Hearings Attended (Preliminary Hearings)	10	—

Respectfully submitted,

L. D. McRAE,

State Attorney.

JACKSON:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	3	—	—
Second Degree	2	—	1
Manslaughter	5	2	—
Rape	1	—	—
Robbery:			
Armed	6	—	2
Unarmed	1	—	—
Assaults:			
With Intent to Commit Felony.....	4	—	—
Other Assaults	2	1	1
Arson and Kindred Offenses.....	1	—	—
Burglary and Kindred Offenses.....	23	1	1
Larceny:			
Of Automobiles	6	—	—
Of Cattle	11	—	2
Kindred Offenses	21	6	10
Embezzlement	1	—	—
Forgery, Counterfeiting and Kindred Offenses	22	1	—
Perjury	2	—	2
Conspiracy	1	—	—
Adultery, Fornication, etc.	1	2	—
Desertion and Withholding Support from Wife and Children.....	16	4	1
Miscellaneous Crimes Not Otherwise Enumerated:			
Hit and Run Driving.....	2	1	—
Unlawful Sexual Intercourse.....	2	1	—
Shooting into Dwelling House.....	1	—	1
Mutilating Public Record.....	1	—	1
Removing Mortgaged Property.....	1	—	—
Unlawful Operation of Auto.....	3	—	—
Second Felony.....	1	—	—
Administering Poison	—	1	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	3	Dismissed
Bond Validation Proceedings.....	1	—
Criminal Hearings Attended (Preliminary Hearings)	30	—

Respectfully submitted,

L. D. McRAE,

State Attorney.

WASHINGTON:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	1	—	1
Second Degree	1	—	—
Manslaughter	2	—	—
Assaults:			
With Intent to Commit Felony.....	6	—	—
Other Assaults	5	—	—
Burglary and Kindred Offenses.....	4	—	—
Larceny:			
Kindred Offenses	9	1	2
Embezzlement:			
Public Officers	8	—	—
Other Kinds	1	—	1
False Pretenses and Kindred Offenses..	2	—	—
Forgery, Counterfeiting and Kindred Offenses	8	—	1
Resisting Arrest, etc.	1	—	—
Conspiracy	1	1	—
Incest	1	—	—
Violation Liquor Law, Second Offense..	2	—	—
Desertion and Withholding Support from Wife and Children.....	10	1	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Hit and Run Driving	3	—	1
Disposing of Mortgaged Property..	3	—	—
Operating Auto while Drunk.....	2	—	—
Doing Business without License....	1	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Bond Validation Proceedings.....	1	—
Criminal Hearings Attended (Preliminary Hearings)	10	—
Habeas Corpus Hearings Attended.....	4	—

Respectfully submitted,

L. D. McRAE,

State Attorney.

FIFTEENTH JUDICIAL CIRCUIT

Broward County

Palm Beach County

BROWARD:

	Number of Indictments or Informations	Convictions	Acquittals	Pending
Assault With Intent to				
Murder	5	4	—	1
Assault With Intent to				
Rape	5	5	—	—
Attempted Robbery	2	2	—	—
Accessory Before Fact to				
Breaking & Entering	1	1	—	—
Aiding in Commission of				
Felony	1	1	—	—
Breaking and Entering....	39	35	3	1
Bigamy	1	—	—	1
Crime Against Nature....	3	3	—	—
Desertion	1	—	—	1
Embezzlement	6	2	3	1
Entering Grove in Night				
to Commit Felony....	2	1	1	—
Entering without Break-				
ing	1	—	—	1
False Swearing	1	—	—	1
Forged Instruments,				
uttering & publishing	10	6	1	3
False Pretenses, obtain-				
ing property by	2	2	—	—
Grand Larceny	16	14	1	1
Incest	1	1	—	—
Murder, First Degree....	11	7	2	2
Murder, Second Degree..	4	1	1	2
Manslaughter	2	2	—	—

Motor Vehicles, Larceny				
of	7	6	—	1
Rape	1	—	1	—
Robbery, Armed	1	1	—	—
Robbery, Unarmed	2	2	—	—
Violation Beverage Act..	7	2	1	4
Totals	132	98	14	20

While the foregoing figures show a total number of 132 indictments or informations charging felonies, due to joint indictments the number of individual defendants involved totaled 150.

Convictions include convictions of lesser degree than charged in cases where verdicts were guilty of such lesser degree.

In the number of acquittals shown, 4 of such cases were nolle prossed.

INDICTMENTS OR INFORMATIONS CHARGING MISDEMEANORS, AND TRANSFERRED TO COUNTY COURT FOR DISPOSITION

Charge:	Number of Indictments or Informations
Disturbing Religious Worship.....	1
Exhibition of Deadly Weapon.....	1
Aggravated Assault	1

NO TRUE BILLS RETURNED BY GRAND JURY

	Number of Indictments or Informations
Assault with Intent to Murder.....	3
Assault with Intent to Rape.....	1
Grand Larceny	1
Manslaughter	2
Murder, First Degree.....	4
Operating Gambling House.....	2
Perjury	2
Robbery, Unarmed	1

MISCELLANEOUS MATTERS REPRESENTED BY STATE AND ASSISTANT STATE ATTORNEY

	Number of Indictments or Informations
Habeas Corpus	3
Disbarment Proceedings	1
Bond Validations, etc.	9

Injunctions to Abate Nuisances.....	11
Restoration of Judicial Sanity.....	5

Respectfully submitted,

LOUIS F. MAIRE,

State Attorney.

PALM BEACH:

	Number of Indictments or Informations	Convictions	Acquittals	Pending
Murder in First Degree..	11	9	2	—
Indictments Returned but Transferred to Criminal Court of Record of Palm Beach County for Trial:				
Murder in 2nd Degree.....	9	—	—	—
Manslaughter	2	—	—	—
Assault	7	—	—	—
Gambling and Operating a Gambling House....	2	—	—	—

There was also returned one indictment for rape and one for kidnaping against Thomas Goddard, who was convicted of murder in the first degree and electrocuted and, therefore, these two cases were nolle prossed.

There were also returned four No True Bills.

MISCELLANEOUS MATTERS

	Number	Disposition
Habeas Corpus Proceedings.....	23	—
Bond Estreatures	4	—
Bond Validations	18	—
Coroner's Inquests Attended.....	12	—

Respectfully submitted,

LOUIS F. MAIRE,

State Attorney.

XI

COUNTY SOLICITORS

REPORTS OF COUNTY SOLICITORS, COVERING CRIMINAL COURTS OF RECORD AND COURTS OF CRIME, FOR YEARS 1939-1940 UNDER SECTION 132, C. G. L.

Dade County
Duval County
Escambia County
Hillsborough County

Monroe County
Orange County
Palm Beach County
Polk County

DADE COUNTY

Hon. George Couper Gibbs
Attorney General
Tallahassee, Florida
My dear General:

As provided for by and under Section 132, Compiled General Laws of Florida, I submit the report of the office of the County Solicitor prosecuting in the Criminal Court of Record and the Court of Crimes of Dade County, Florida, covering disposition of criminal cases during the period beginning January 1, 1939, and ending December 31, 1940.

The purpose of this report is not only to comply with Sec. 132, C. G. L. 1927, but also to acquaint the Bench, the Bar and the public generally, and the people in Dade County particularly, with the scope and extent of the activities of this office and the manner in which the business has been handled. The table of statistics hereinafter shown give not only the number but the kind of criminal offenses that pass through the office, and, in general, the condition of the calendar at the close of the year.

In this connection it is stated with deep satisfaction that this office is well abreast of its work and in better condition and more in harmony with the other law enforcement officials of this county than at any previous time during my tenure of office, which covers a period of approximately twelve years. In many instances only a matter of hours has elapsed between the time of arrest and time of conviction.

The 1939 Legislature passed an act relating to Dade County providing for a probation and parole officer for the Criminal Court of Record and the Court of Crimes of Dade County, Florida. The Governor, Fred P. Cone, appointed Harry O. Hunter as probation officer, who has served in this position from June 6, 1939.

Mr. Hunter's report shows that during this period of time (approximately eighteen months) 245 offenders have been placed on probation. Of this total number of 245 offenders, eighty-two have been discharged from probation by the court as rehabilitated and worthy of the further faith and confidence of the people of this State. Mr. Hunter further reports that

out of the total number of 245 placed on probation only twenty-one, or less than ten per cent, have violated any of the conditions of thier parole, as a result of which they have been sentenced by the court and are now, or have received, substantial punishment for the offense which they committed.

There are many other interesting facts and data contained in Mr. Hunter's report, a copy of which we have asked Mr. Hunter to furnish you.

Under this understanding, which we believe to be an enlightened conception for treatment of offenders, especially in minor matters not generally affected by a general public interest, first offenders are dealt with leniently and, as herein shown, are placed frequently in the custody of the probation officer, who uses every reasonable effort to reestablish, rehabilitate and find positions for the offenders.

The greatest advancement in trial work and saving to the taxpayer was brought about by a case arising in this jurisdiction—the case of *James Zellers v. State of Florida*, reported in 189 Southern, p. 236. With the consent of the Attorney General this office cooperated in the prosecution of this case in the Supreme Court and filed a brief. The Supreme Court of Florida decided that in all cases except where a sentence of death may be imposed, trial by jury may be waived by the defendant.

This provision was later incorporated in the Florida Criminal Procedure Act, Section 181, which was sponsored by the Florida State Bar Association under the guidance of a committee of which Bart A. Riley of the Miami Bar was chairman.

Prior to the decision in the Zeller's case the weight of the accepted legal authority in the State was that a defendant could not waive a jury in any felony case because of constitutional limitation.

Since the Zeller's decision and the adoption of the Florida Criminal Code, the minutes of the Criminal Court of Record, Dade County, show that in approximately 90% of the cases actually tried the defendants waived a jury. We wish to add that without a doubt, many defendants and attorneys waived a jury because they had implicit confidence in the fairness and judicial temperament of Honorable Ben C. Willard, Judge of the Criminal Court of Record, Dade County, Florida. The point is, that prior to the Zeller's decision and the enactment of the criminal code, the judge of the Criminal Court of Record of Dade County had never attempted to try a felony case on plea of not guilty without having the issue of fact decided by a jury.

I wish to report to you and recommend to other interested county solicitors, a rule in the Dade County Criminal Court of Record by which all defendants, upon being informed against and without subpoenaing of witnesses, promptly be brought before the judge and arraigned. If the defendant pleads not guilty, a full, fair and complete explanation of a trial before the judge without a jury is then given to the defendant or his attorney if he has one, and he is asked if he wishes to waive trial by the jury. If the answer be "yes" then within a short day the witnesses are subpoenaed before the judge and trial had. On the other hand, if he requests a trial by jury, the judge, after hearing the solicitor and his attorney, immediately sets an agreeable trial date.

With this rule our experience undoubtedly has contributed in no small measure to great saving to the taxpayers by the elimination of delays and postponements which we believe would otherwise occur.

Thousands of complaints have been handled by this office during the period covered by this report. Lack of facilities and personnel have made it impossible to establish and keep a detailed record of these complaints heard and investigated which resulted in no charges being filed. In this classification comes a large number of border-line cases and technical violations which are adjusted by this office without criminal prosecution and at a great saving to the taxpayer.

During the past two years this office, with the consent of the Attorney General, has participated in several important appeals and writs of habeas corpus. These particular activities have been assigned to Thomas H. Anderson, assistant county solicitor, whose report follows:

REPORT ON APPEAL CASES AND LEGISLATION—1938-1940

In the case of *George Bloom v. State of Florida*, appealed from Court of Crimes, the Solicitor filed a brief and argued the cause orally. Judgment of lower court affirmed.

In the case of *William L. Brooks v. State of Florida*, appealed to the Supreme Court, the Solicitor filed a brief. Judgment was affirmed.

In the case of *John S. Dunham v. State of Florida*, the Solicitor filed a brief in the Supreme Court and argued same. Judgment was reversed.

In the case of *State of Florida v. R. L. Heines*, the County Solicitor took the first appeal permitted under the Criminal Procedure Act of 1939. The case involved the criminal liability of a person, not a physician, who attempted to prescribe medical treatment resulting in death.

The Supreme Court reversed the Criminal Court of Record of Dade County, holding that the information charged a criminal offense.

In the case of *A. E. Hemmings v. State of Florida*, the Supreme Court on rehearing reversed its previous judgment and held that when Hemmings assumed to testify before the Grand Jury he was required to testify truthfully, and that he could not commit perjury in an effort to save himself from an indictment.

In this case the County Solicitor filed a brief and participated in the oral argument.

In the case of *State v. Frank Hyde and C. K. Slayton*, the defendants were convicted of operating a gambling house, to the judgment in which they sued out a writ of error to the Supreme Court. The judgment was affirmed and afterward the defendants applied to the circuit court for writ of habeas corpus contending that conviction was void because the proceedings were fatally defective.

The County Solicitor, through the Attorney General, obtained a writ of prohibition from the Supreme Court against the circuit court prohibiting the hearing on the ground that the matter had been foreclosed by the judgment of affirmance.

A peremptory writ of prohibition was subsequently issued, but in the meantime a legal tangle arose resulting from the fact that the Governor had issued a reprieve to the defendants which they had to avoid in order to bring the writ of habeas corpus. As long as they were at liberty on the reprieve they had no basis for a habeas corpus, so they surrendered themselves to the custody of the sheriff in order to challenge by habeas corpus the legality of their conviction. As soon as they were in custody and the writ of prohibition had become absolute, the sheriff held them and refused to release them, claiming that he held them under the commitment issued on the judgment of the Criminal Court of Record.

The Governor then refused to interfere with the matter and both the defendants subsequently served their time at the state penitentiary.

The case of *State of Florida ex rel. Sherman Luban v. D. C. Coleman* involved the right of the Court to punish for contempt for failure to testify truthfully. The Solicitor resisted the proceedings before the circuit judge on habeas corpus and assisted the Attorney General's office in subsequent writ of error in which the judgment in the habeas corpus was reversed.

In the case of *W. J. McNair v. State of Florida* the conviction was appealed to the circuit court where brief was filed and the judgment was affirmed—but the case is pending on petition for rehearing.

The County Solicitor, together with the State Attorney, filed a suit on behalf of the State against Palm Lake Development, Inc., operators of the notorious La Paloma Club, in which an injunction was obtained forbidding the defendant from conducting any lewd or lascivious acts in the place.

In the case of *John Pandula v. State of Florida*, Pandula was convicted of assault and battery in the Court of Crimes and appealed to the Circuit Court. A brief was filed and oral argument had by the County Solicitor and the judgment was affirmed.

In the case of *C. K. Slayton* who was convicted in the Court of Crimes of assault and battery and appealed to the Circuit Court, brief was filed by the County Solicitor, and the case is still pending.

In the case of *Ralph Stalvey v. State of Florida*, conviction of armed robbery was affirmed in the Supreme Court—the County Solicitor filing a brief.

In the case of *J. O. Tibbetts v. State of Florida*, brief was filed by the County Solicitor in the Supreme Court, appeal being taken by defendant on judgment of conviction in the Criminal Court of Record.

In the case of *Aldine Taylor v. State of Florida*, brief was filed by the County Solicitor and judgment of conviction was affirmed.

The Trianon Amusement Co., brought suit against the County Solicitor to enjoin him from prosecuting it for maintenance of a nuisance. The County Solicitor answered the suit and prayed that the manner in which the defendant operated his business be enjoined.

The plaintiff was operating a night club on the outskirts of the City of Miami. About forty witnesses were called and testified as to the manner of the operation of the club, most of them saying that the music and dancing

and noise from the place was sufficient to disturb them and keep them from sleeping until late at night.

The Circuit Judge entered an order in favor of the plaintiff and enjoined the County Solicitor from prosecuting the operators of the club, from which ruling the County Solicitor appealed. The case had not been argued in the Supreme Court at the time of the preparation of this report.

Perhaps the most important criminal appeal participated in by the County Solicitor was the case of *James Zellers v. The State of Florida*. Zellers was informed against for the larceny of an automobile. He waived trial by jury and was convicted. He sued out writ of error to the Supreme Court and contended that the conviction was void because he had no right to waive a jury in felony cases.

He was represented by Joe Brown Booth Esq., who raised the question at the request of the County Solicitor's office for the purpose of having this question determined. The Supreme Court affirmed the conviction, holding that it was permissible to waive right of trial by jury in felony cases. As a result of this the Criminal Court of Record has been enabled to attend to a large part of its business without the necessity of having juries, which has greatly dispatched the business of the court and saved the county much money in jury fees.

HABEAS CORPUS AND EXTRADITIONS

In addition to above enumerated cases the County Solicitor's office participated in habeas corpus cases involving reduction of bond and similar matters.

There were also many extradition cases handled and in one case involving an application by the State of New York to extradite a prisoner in Florida charged with abandonment of children in the State of New York, the County Solicitor, as a matter of courtesy to the District Attorney of Nassau County, New York, sent one of his assistants, at the expense of Nassau County, to Tallahassee to assist in the extradition. As a result of this trip the prisoner was induced to return voluntarily.

LEGISLATION

As a result of the reversal of the judgment of conviction in the case of *State of Florida v. John S. Dunham*, the County Solicitor prepared a bill to be submitted to the 1941 session of the Legislature, the effect of which would be the prevention of the recurrence of such an event. Dunham was informed against for embezzlement as a bailee. He was convicted but the judgment was reversed on the grounds that the statute under which he was prosecuted did not apply to a bailee other than the kind specifically enumerated in the statute, which were carriers, wharfingers, and such.

The bill proposed by the County Solicitor defines the offense of stealing regardless of whether the person took the property under circumstances amounting to larceny at common law or under those existing in various forms of embezzlement where a variety of relationships can exist, such as bailee, servant, agent, etc.

The passage of this Act will prevent the reversal of convictions for reasons stated in the Dunham case. The jury found Dunham guilty; his conviction was reversed on a technicality.

In an effort to reduce expenses the County Solicitor has also prepared for passage an Act making it permissible for persons voluntarily to appear and testify without the necessity of a subpoena—it being the law at the present time that in order to furnish the basis for an information the person testifying before the County Solicitor must be under subpoena.

SUMMARY

The summary of our activities show that within the past two years 6,817 litigated cases were handled by the office of the County Solicitor of Dade County. Of this number 3,070 were disposed of in the Criminal Court of Record and 3,732 disposed of in the Court of Crimes. Fifteen appeals were participated in by this office.

Including both the Criminal Court of Record and Court of Crimes there were 5,092 convictions and pleas. The record shows that there were 307 acquittals. In 94.3% of the cases brought to trial the cases were successfully terminated either in plea or verdict of guilt.

At the end of this two-year period there were pending approximately 225 current cases in the Court of Crimes and approximately 50 current cases undisposed of in the Criminal Court of Record.

A careful analysis of this report does not reveal the presence of any uncontrolled crime wave in our community. Such infractions as we have enumerated are those that every large community such as ours experiences. As a matter of fact, a breakdown of our records show that there has been less crime committed and fewer cases filed in Dade County during the calendar year of 1940 than there were during the calendar year 1939.

Very respectfully submitted,

ROBERT R. TAYLOR,

County Solicitor, Criminal Court
of Record, Dade County, Florida.

DADE—CRIMINAL COURT OF RECORD AND COURT OF CRIMES:

Offense	Cases filed include justice fees	No infor- mation re- turned by solicitor	Nolle prosequi	Con- victions and pleas	Acquittals
Abortion	0	0	0	0	0
Adultery	9	0	5	4	0
Aggravated assault	135	8	24	89	14
Arson	5	0	0	2	3
Assault and battery	261	16	48	175	22
Assault to commit felony	130	8	29	87	16

Beating board bill	42	1	8	31	2
Bigamy	7	1	1	5	0
Breaking and entering	553	9	94	438	32
Bribery	2	1	0	1	0
Contempts	4	2	0	2	0
Contributing to dependency of minor	28	2	5	19	2
Crime against nature	16	2	2	11	3
Conspiracy	6	0	6	0	0
Driving auto drunk	183	2	15	159	7
Drunk	553	5	15	527	6
Election frauds	25	6	16	0	3
Embezzlement less than \$50	29	2	8	19	0
Embezzlement	109	9	28	80	2
Extortion	4	2	0	1	1
False pretenses	32	8	11	15	1
Forgery	98	4	20	82	0
Fornication	7	0	3	4	0
Gambling (Court Crimes)	85	2	6	77	0
Gambling (Criminal Court)	51	2	5	49	0
Gambling house	239	3	181	54	9
Game laws	117	1	1	115	0
Indecent exposure	24	0	3	19	2
Larceny less than \$50	334	15	37	264	18
Larceny	298	15	47	227	24
Larceny of auto	149	0	21	125	11
Licenses occup.	144	1	72	66	5
Lien laws	52	6	15	29	2
Liquor court crimes	29	1	12	16	0
Liquor, criminal court	545	4	76	471	14
Lottery	11	3	7	3	0
Malicious mischief	40	5	9	23	3
Medical and dental laws	13	0	6	4	3
Manslaughter	30	5	9	11	8
Mayhem	5	1	2	3	0
Miscellaneous (court crimes)	183	8	37	113	15
Miscellaneous	284	11	35	242	11
Motor vehicle laws	256	10	23	223	0
Murder	11	2	2	4	5
Narcotics	18	0	2	19	0
Nuisance	23	0	6	15	2
Non support	33	3	26	6	1
Obscenity	15	0	1	11	3
Obscene prints	1	0	0	1	0
Perjury	9	4	2	2	1
Rape (statutory)	8	0	4	3	1
Receiving stolen property (Ct. crimes)	15	0	2	13	1

Receiving stolen property....	110	10	28	66	12
Reckless driving	334	5	82	299	8
Robbery	155	10	24	108	13
Slot machines	23	0	7	13	3
Trespass	46	5	6	33	2
Usury	5	0	0	5	0
Using automobile	38	2	6	26	4
Vagrancy	336	5	23	303	5
Weapons	130	4	9	113	4
Worthless check	200	18	30	151	1
Zoning	30	0	12	16	2
Grand Totals	6667	249	1154	5092	307

MIAMI, DADE COUNTY, FLORIDA

The following is the report of the Probation and Parole Office from June 6, 1939, to December 31, 1940:

CRIMINAL COURT, HONORABLE BEN C. WILLARD, JUDGE

Active Cases, December 31, 1940	113	
Cases Discharged by Court	32	
Cases Receiving Sentence	14	
TOTAL CASES HANDLED	159	
Cases Discharged for Entering U. S. Service	15	
Restitution in Embezzlement Cases, etc.		\$73,407.17
Restitution Yet to Be Made by Parolees		20,606.25
Number of Days Served (Active Cases)		29,616
Number of Days Served (Closed Cases)		3,569

COURT OF CRIMES, HONORABLE WAYNE ALLEN, JUDGE

Active Cases, December 31, 1940	29	
Cases Discharged by Court	50	
Cases Receiving Sentence	7	
TOTAL CASES HANDLED	86	
Cases Discharged for Entering U. S. Service	2	
Restitution, Bad Checks and Fines		\$76.94
Number of Days Served (Active Cases)		12,312
Number of Days Served (Closed Cases)		6,098

FLORIDA STATE BOARD OF PARDONS

Active Cases, December 31, 1940	5	
Number of Days Served (Active Cases)		798

RECIPROCAL CASES HANDLED FOR OTHER STATES

Active Cases, December 31, 1940	38	
Cases Completing Parole and Discharged	12	
Cases Returned to Home State	9	
Cases Rearrested and Returned	5	
TOTAL CASES HANDLED	64	
Number of Days Served (Active Cases)		9,433
Number of Days Served (Closed Cases)		2,390
 TOTAL CASES HANDLED	 314	
TOTAL NUMBER OF DAYS SERVED		64,216
TOTAL AMOUNT OF RESTITUTION MADE		\$73,484.11
NUMBER OF CASES, RESTITUTION IN FULL	13	
PERSONAL CONTACTS IN OFFICE	4,887	
PERSONAL CONTACTS OUT OF OFFICE	1,083	
INVESTIGATIONS FOR PAROLE REPORTS	92	
EMPLOYMENT OBTAINED FOR PAROLEES	49	
DONATIONS OF HOUSE FURNITURE, CLOTHING, MONEY, ETC., FOR PAROLEES		\$237.50

The foregoing statement is true to the best of my knowledge and belief.

HARRY O. HUNTER,
Probation and Parole Officer,
Dade County, Florida.

DUVAL—
CRIMINAL COURT OF RECORD:

	Indictments Returned by Grand Jury	No Bills Returned by County Solicitor	Verdicts of Not Guilty Returned
Homicide:			
Second Degree	15	—	4
Manslaughter	20	6	1
Mayhem	2	—	—
Robbery:			
Armed	95	25	3
Unarmed	82	16	3
Assaults:			
With intent to Commit Felony	266	44	10
Other Assaults	27	2	—
Arson and Kindred Offenses	6	—	1
Burglary and Kindred Offenses	362	72	4
Larceny:			
Of Automobiles	69	1	—
Of Cattle	3	1	—
Kindred Offenses	157	22	5
Embezzlement	27	3	—

False Pretenses and Kindred Offenses	20	3	1
Forgery, Counterfeiting and Kindred Offenses	67	17	—
Trespasses, Injuring Buildings, etc.	9	—	—
Perjury	4	2	—
Adultery, Fornication, etc.	12	—	—
Bigamy	5	2	—
Crime Against Nature	8	5	—
Violation Liquor Law	68	1	1
Desertion and Withholding Support from Wife and Children	25	5	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Worthless Checks	13	—	—
Receiving Stolen Property	34	5	1
Second Conviction of Felony	32	—	—
Fourth Conviction of Felony	19	—	—
Careless and Reckless Driving	60	1	—
Possession of Lottery Tickets	4	—	—
Exhibition of Deadly Weapon	6	—	—
Violation of Narcotic Law	23	5	—
Operating House of Ill Fame	5	—	—
Using Vehicle without Consent	7	—	—
Carnal Knowledge	5	1	1
Inmate of Disorderly House	7	—	—

OTHER CASES HANDLED

	Number	Disposition
Bond Estreature Proceedings	26	—

Respectfully submitted,

WAYNE E. RIPLEY,

County Solicitor.

ESCAMBIA COUNTY—No Report.

HILLSBOROUGH—

CRIMINAL COURT OF RECORD:

	Informations Filed	Guilty	Not Guilty
Homicide:			
Second Degree Murder	6	3	3
Manslaughter	9	4	5
Mayhem	1	1	—
Robbery:			
Armed	9	7	2
Unarmed	9	7	2

Assaults:			
To rape	5	5	—
To rob	6	6	—
To murder	13	13	(or lesser offense)
To commit mayhem	1	1	—
Aggravated	57	46	11
Assault and Battery	21	11	10
Affray	1	—	1
Attempts to commit felonies	11	11	—
Adultery	1	—	1
Burglary	157	149	8
Bigamy	1	1	—
Beating Board Bill	3	2	1
Beating Way on Train	186	186	—
Contributing to minor's delinquency	3	2	1
Crime Against Nature	1	1	—
Carnal Intercourse with Female			
under 18	6	5	1
Conspiracy	1	1	—
Driving While Drunk	70	66	4
Being Drunk	82	78	4
Entering without Breaking	19	18	1
Embezzlement	13	9	4
Escape	7	7	—
Forgery	46	42	4
Gambling cases	23	13	10
Incest	5	—	3
Killing Beast of Another	3	2	1
Larceny:			
Automobile	37	35	2
Cattle	4	4	—
Other animals	2	2	—
Grand	32	30	2
Petit	146	137	9
Lewd and Lascivious Behavior.....	5	4	1
Lottery	6	4	2
Liquor Law Violations	123	97	26
Non-support of minors	10	3	7
Obtaining Property under False			
Pretense	7	4	3
Operating a Nuisance	2	2	—
Property under lien,			
Removing, disposing of	14	10	4
Reckless Driving	21	17	4
Taking and Using Car			
Without Consent	12	10	2
Traffic violations	2	2	—
Trespass	10	7	3

Usury	1	1	—
Unemployment Compensation Law Violation	5	5	—
Vagrancy	17	15	2
Worthless Checks	20	17	3
Buying and Receiving Stolen Property	5	3	2
Burning woods	4	2	2
Firearms law violations	7	6	1
Election law violations	4	3	1
Indecent Exposure	2	2	—
Doing Business without License	2	—	2
Imputing Want of Female Chastity	1	—	1
Gas Meter Tampering	1	—	1
Culpable Negligence	1	1	—
Fish Law Violations	2	2	—
Fornication	1	1	—
	1282	1125	157

Respectfully submitted,

JOSEPH E. WILLIAMS,

County Solicitor.

MONROE—

CRIMINAL COURT OF RECORD:

	Informations Filed	Nol Prossed	Verdicts of Not Guilty Returned
Homicide:			
Manslaughter	2	—	2
Robbery:			
Unarmed	1	—	1
Assaults:			
With Intent to Commit Felony	2	—	—
Other Assaults	39	2	5
Burglary and Kindred Offenses	7	—	1
Larceny:			
Of Automobiles	2	—	—
Kindred Offenses	23	—	1
False Pretenses and Kindred Offenses	2	—	—
Trespasses, Injuring Buildings, etc.	5	—	—
Crime Against Nature	1	—	—
Desertion and Withholding Support			
from Wife and Children	9	3	1
Miscellaneous Crimes Not Otherwise Enumerated:			
Vagrancy	22	—	—
Receiving Stolen Property	3	1	—

Operating Vehicle Under the Influence of Liquor	17	1	—
Reckless Driving	19	1	—
Temporarily Using Another's Prop- erty	5	—	—
Obtaining Lodging with Intent to defraud	3	—	—
Malicious Mischief	3	—	—
Possession of Slot Machines	1	—	—

OTHER CASES HANDLED

Resisting Harbor Master in Perform- ance of His Duties	1	—	1
Possession of Stone Crabs in the Closed Season	1	—	—
Overloaded Motor Vehicle	1	—	—
Operating a Motor Vehicle Without a Proper License	13	—	—
Removing Ornaments and Memorials from Tombs	1	—	—
Open Profanity	2	—	—
Possession of Crayfish in the Closed Season	2	—	—
Setting Fire in the Woods	1	—	—
Violation of the Liquor Laws	1	—	—
Contributing toward the Delinquency of a Minor	3	—	—
Violation of State Game Laws	3	—	—
Embezzlement	1	1	—
Dealing in Sea Products Without a License	1	—	—
Having possession of undersized com- mercial Sponge	8	—	—
Unlawful Carnal Intercourse	1	—	—
Operating and Setting up a Game of Chance	4	—	—
Drunkenness	2	—	—
Carrying a Concealed Weapon	1	—	—
Operating a Boat without a License	2	1	—

Therefore my report shows that during the above period I filed 214 cases, 192 convictions were obtained, 12 verdicts of not guilty returned, and 10 cases were nol prossed.

Respectfully submitted,
ALLAN B. CLEARE, JR.,
County Solicitor.

ORANGE—

CRIMINAL COURT OF RECORD:

	Informations Filed by County Solicitor	Verdict of Not Guilty Returned
Homicide, Second Degree	10	1
Manslaughter	12	4
Robbery:		
Armed	5	—
Unarmed	2	—
Forgery, Worthless Check and Kindred Offenses	138	2
Assaults:		
With Intent to Commit Felony	9	—
Aggravated Assault	41	5
Other Assaults	32	3
Breaking and Entering and Kindred Offenses	83	3
Grand Larceny	35	2
Petit Larceny	74	3
Receiving Stolen Goods	2	—
Larceny of an Auto	14	1
Embezzlement	14	2
Incest	2	—
Desertion and Withholding Support	2	—
Temporary Use of Personal Property	11	1
Arson and Kindred Offenses	6	1
Resisting Arrest	2	—
False Pretenses and Kindred Offenses	17	5
Traffic Violations	256	5
Other Misdemeanors	183	6
	950	44

Respectfully submitted,

O. RAYMOND ELLARS,

County Solicitor.

PALM BEACH—

CRIMINAL COURT OF RECORD:

	Informations Filed	Guilty	Cases No-Billed by Co. Sol.	Verdicts of Not Guilty Returned
Homicide:				
Second Degree	6	1	5	—
Manslaughter	10	9	1	1
Robbery:				
Armed	10	8	2	1
Unarmed	6	6	—	—

Assaults:				
Aggravated Assault	77	56	21	—
With Intent to Commit Fel-				
ony	54	30	24	—
Other Assaults	30	21	9	—
Illegal Auctions	3	—	3	—
Sending Threatening Communi-				
cations	2	2	—	—
Arson and Kindred Offenses	2	2	—	—
Burglary and Kindred Offenses	130	100	29	1
Larceny:				
Of Automobiles	33	27	6	—
Of Dog	6	4	2	—
Kindred Offenses—Temp.				
Use Property Another	13	13	—	—
Embezzlement	10	6	4	—
False Pretenses and Kindred				
Offenses	5	3	2	—
Forgery and Kindred Offenses	35	25	10	—
Trespasses, Injuring Buildings,				
etc.	2	2	—	—
Violation Small Loan Laws	2	1	1	—
Violation Barber Act	3	1	2	—
Disp. Mtg. Prop.	3	2	1	—
Shooting into Dwelling	1	1	—	—
Conspiracy	1	1	—	—
Adultery, Fornication, etc.	5	4	1	—
Incest	1	—	1	—
Bigamy	2	2	—	—
Indecent Exposure Person, etc.	3	—	3	—
Crime Against Nature	1	1	—	—
Violation Liquor Law	63	48	15	—
Desertion and Withholding Sup-				
port from Wife and Children	22	20	2	—
Taking Turtles Unlawfully	5	5	—	—
Miscellaneous Crimes Not Other-				
wise Enumerated:				
Receiving Stolen Property	11	8	3	—
Concealed Weapons	15	9	5	1
Grand Larceny	76	62	13	1
Petit Larceny	130	108	21	1
Malicious Mischief	4	4	—	—
Traffic Violations	77	64	12	1
Driving While Drunk	49	38	11	—
Illegally Cutting Timber	16	13	3	—
Gambling, etc.	10	9	8	1
Vagrancy	29	16	13	—

Drunk	57	37	20	—
Violation Game and Fish Laws	33	28	2	3

Respectfully submitted,
W. E. ROEBUCK,
County Solicitor.

POLK—

CRIMINAL COURT OF RECORD:

JANUARY 1, 1939 to AUGUST 4, 1939

	Convictions	Nol Prosses	Verdicts of Not Guilty Returned
Robbery, Unarmed	3	2	1
Assaults with Intent to Commit Felony	27	5	3
Larceny:			
Of Automobiles	3	—	—
Kindred Offenses	56	12	5
False Pretenses and Kindred Offenses	7	3	—
Forgery, Counterfeiting and Kindred Offenses	10	—	—
Adultery, Fornication, etc.	2	—	—
Desertion and Withholding Support from Wife and Children	6	—	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Lottery—Gambling	10	15	—
Various Operations without License	5	—	—
Driving While Drunk	28	—	4
Reckless Driving	17	1	—
Hit and Run Driving	1	—	—
Sale of Liquor	4	8	—
Drunks	173	2	1
Other Miscellaneous	111	27	9

AUGUST 4, 1939 to JANUARY 1, 1941

	Convictions	Nol-Prosses	Verdicts of Not Guilty Returned
Mayhem	3	—	3
Robbery, Unarmed	5	2	—
Assaults:			
With Intent to Commit Felony	83	—	—
Other Assaults	52	—	1
Burglary and Kindred Offenses	62	1	1
Larceny:			
Of Automobiles	7	—	—
Of Cattle	5	—	2

Kindred Offenses	87	—	2
Embezzlement	4	—	—
False Pretenses and Kindred Offenses	12	—	—
Forgery, Counterfeiting and Kindred Offenses	8	—	1
Trespasses, Injuring Buildings, etc.	15	1	1
Resisting Arrest, etc.	4	—	—
Adultery, Fornication, etc.	7	—	—
Miscegenation	2	—	1
Crime Against Nature	2	—	—
Desertion and Withholding Support from Wife and Children	1	—	—
Miscellaneous Crimes Not Otherwise Enumerated:—			
Lottery	11	—	—
Gambling	32	1	—
Various Operations without License	87	1	1
Driving while Drunk	78	—	—
Reckless Driving	57	—	—
Hit and Run Driving	4	—	—
Sale of Liquor	64	5	3
Drunks	377	1	—
Other Miscellaneous	191	3	7

Respectfully submitted,

GUNTER STEPHENSON,

County Solicitor,

EIGHTH JUDICIAL CIRCUIT

Alachua County
Baker County
Bradford County

Gilchrist County
Levy County
Union County

ALACHUA:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	9	—	—
Second Degree	2	—	—
Manslaughter	7	—	—
Mayhem	2	—	—
Robbery:			
Armed	1	—	—
Assaults:			
With Intent to Commit Felony....	18	1	—
Other Assaults	13	—	—

Arson and Kindred Offenses.....	1	—	—
Burglary and Kindred Offenses.....	67	2	—
Larceny:			
Of Automobiles	13	1	—
Of Cattle	—	—	1
Kindred Offenses	12	2	3
Embezzlement	2	1	—
False Pretenses and Kindred Offenses..	3	—	—
Forgery, Counterfeiting and Kindred Offenses	27	—	—
Trespasses, Injuring Buildings, etc.	1	—	—
Perjury	1	—	—
Resisting Arrest, etc.	2	—	—
Bigamy	—	1	—
Desertion and Withholding Support from Wife and Children.....	6	4	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Shooting into Dwelling.....	3	—	—
Hit and Run	8	1	—
Violation Narcotic Act.....	1	—	—
Receiving Stolen Property	7	1	2
Unlawful Operation Motor Vehicle for Compensation	7	—	—
Burning Building of Another with Intent to Defraud Insurer.....	1	—	—
Disposing of Property Under Lien..	1	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	18	—
Criminal Hearings Attended.....	20	20
Habeas Corpus Hearings Attended.....	3	3

Respectfully submitted,

T. E. DUNCAN,

State Attorney.

BAKER:

	Indictments Returned by Grand Jury and Informa- tions Filed	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	2	2	—
Rape	—	2	—
Robbery:			
Unarmed	—	1	—

Assaults:

With Intent to Commit Felony.....	3	—	—
Burglary and Kindred Offenses.....	10	3	—
Larceny:			
Of Automobiles	4	—	—
Of Cattle	2	—	—
Kindred Offences	5	2	—
Embezzlement:			
Public Officers	1	—	1
Other Kinds	2	—	—
Trespasses, Injuring Buildings, etc.	3	—	—
Incest	1	—	—
Bigamy	—	1	—
Desertion and Withholding Support from Wife and Children.....	2	8	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Criminal Hearings Attended.....	5	5
Habeas Corpus Hearings Attended.....	3	3

Respectfully submitted,
T. E. DUNCAN,
State Attorney.

BRADFORD:

	Indictments Returned by Grand Jury	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	1	—	—
Rape	1	—	Mistrial

Informations Filed

Robbery:			
Armed	2	—	—
Unarmed	2	—	—
Assaults:			
With Intent to Commit Felony.....	4	—	—
Burglary and Kindred Offenses.....	5	—	—
Larceny:			
Of Automobiles	1	—	—
Of Cattle	1	—	—
Kindred Offences	4	—	—
False Pretenses and Kindred Offenses..	1	—	—
Forgery, Counterfeiting and Kindred Offenses	6	—	—
Trespasses, Injuring Buildings, etc.	1	—	—

Incest	1	—	1
Miscellaneous Crimes Not Otherwise Enumerated:			
Unlawful Possession of Lottery Tickets	3	—	—
Unlawful Operation Motor Vehicle	8	—	—
Driving Car while Drunk.....	1	—	—
Malicious Mischief	1	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Bond Validation Proceedings.....	1	—
Bond Estreuture Proceedings.....	4	4
Criminal Hearings Attended.....	8	—
Habeas Corpus Hearings Attended.....	5	5

Respectfully submitted,
T. E. DUNCAN,
State Attorney.

GILCHRIST:

	Informations Filed and Indictments Returned by Grand Jury	No Bills Returned by Grand Jury and State Attorney	Verdicts of Not Guilty Returned
Assaults:			
With Intent to Commit Felony.....	—	1	—
Other Assaults	1	—	—
Burglary and Kindred Offenses.....	3	—	—
Larceny:			
Of Cattle	2	1	1
Kindred Offenses	2	—	—
Forgery, Counterfeiting and Kindred Offenses	1	—	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Practicing Dentistry Without Cer- tificate	1	—	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Criminal Hearings Attended.....	4	4

Respectfully submitted,
T. E. DUNCAN,
State Attorney.

LEVY:

	Informations Filed and Indictments Returned by Grand Jury	No Bills Returned by Grand Jury and State Attorney	Verdicts of Not Guilty Returned
Homicide:			
First Degree	2	3	—
Manslaughter	1	—	1
Rape	1	—	—
Robbery:			
Unarmed	1	—	—
Assaults:			
With Intent to Commit Felony.....	1	1	—
Other Assaults	—	1	—
Sending Threatening Communications..	—	1	—
Arson and Kindred Offenses.....	—	1	—
Burglary and Kindred Offenses.....	8	6	—
Larceny:			
Of Automobiles	1	—	—
Of Cattle	1	1	—
Kindred Offenses	3	3	—
Trespasses, Injuring Buildings, etc.	—	1	—
Desertion and Withholding Support from Wife and Children.....	—	2	—
Miscellaneous Crimes Not Otherwise Enumerated:			
Shooting into Dwelling.....	1	—	—
Driving Automobile while Intoxi- cated	—	1	—

OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	2	Dismissed
Bond Validation Proceedings.....	1	1
Criminal Hearings Attended.....	12	12
Habeas Corpus Hearings Attended.....	5	5

Respectfully submitted,
T. E. DUNCAN,
State Attorney.

UNION:

	Indictments Returned by Grand Jury and Informa- tions Filed	No Bills Returned by Grand Jury	Verdicts of Not Guilty Returned
Homicide:			
First Degree	1	1	—

Robbery:			
Armed	Information Filed	—	
Assaults:			
With Intent to Commit Felony.....	4	—	—
Burglary and Kindred Offenses.....	1	—	—
Larceny: Kindred Offenses.....	1	—	—
Embezzlement:			
Public Officers	1	—	—
Miscellaneous Crimes Not Otherwise			
Enumerated:			
Information for Injuring School			
House	1	—	—
Information for violation of State			
Beverage Act	1	—	—
Information for Unlawful Possession			
of Whiskey without Federal or			
State Stamps Affixed Thereto.....	1	—	—

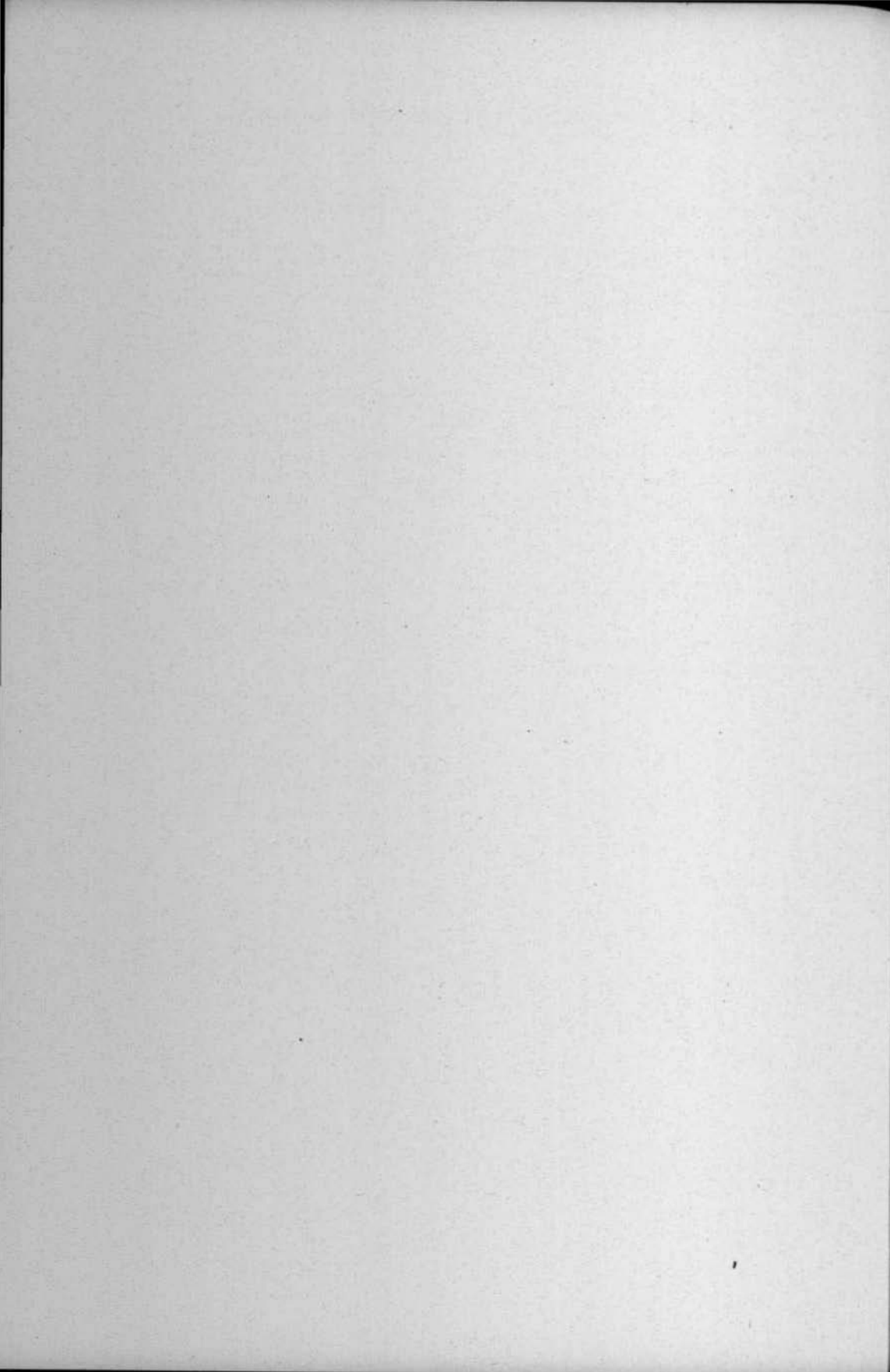
OTHER CASES HANDLED BY STATE ATTORNEYS

	Number	Disposition
Bond Validation Proceedings.....	1	1
Habeas Corpus Hearings Attended.....	2	2

Respectfully submitted,

T. E. DUNCAN,

State Attorney.



PART II

Opinions

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di Carlo

Part II

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PREFACE

Part II of this report contains copies of certain opinions rendered by me during the past two years. I reaffirm these published opinions which shall be considered as superseding prior opinions given by me upon the subjects contained therein. I have rendered a great many opinions during the past two years that are not included in this report. I have sought to eliminate all opinions of a purely local nature or application, as well as other opinions that for one reason or another will be of no future service.

The arrangement of the opinions is by subjects, alphabetically arranged, and any subject can readily be found by reference to the Table of Contents appearing on the next page, or by the index found in the back of this volume.

I have also added to the Index a Table of Statutes and Constitutional provisions cited or referred to in the opinions. This table will save much time in using the report.

GEORGE COUPER GIBBS,
Attorney General of Florida.

Tallahassee, Florida,
January First, A. D.
Nineteen Hundred Forty-One.

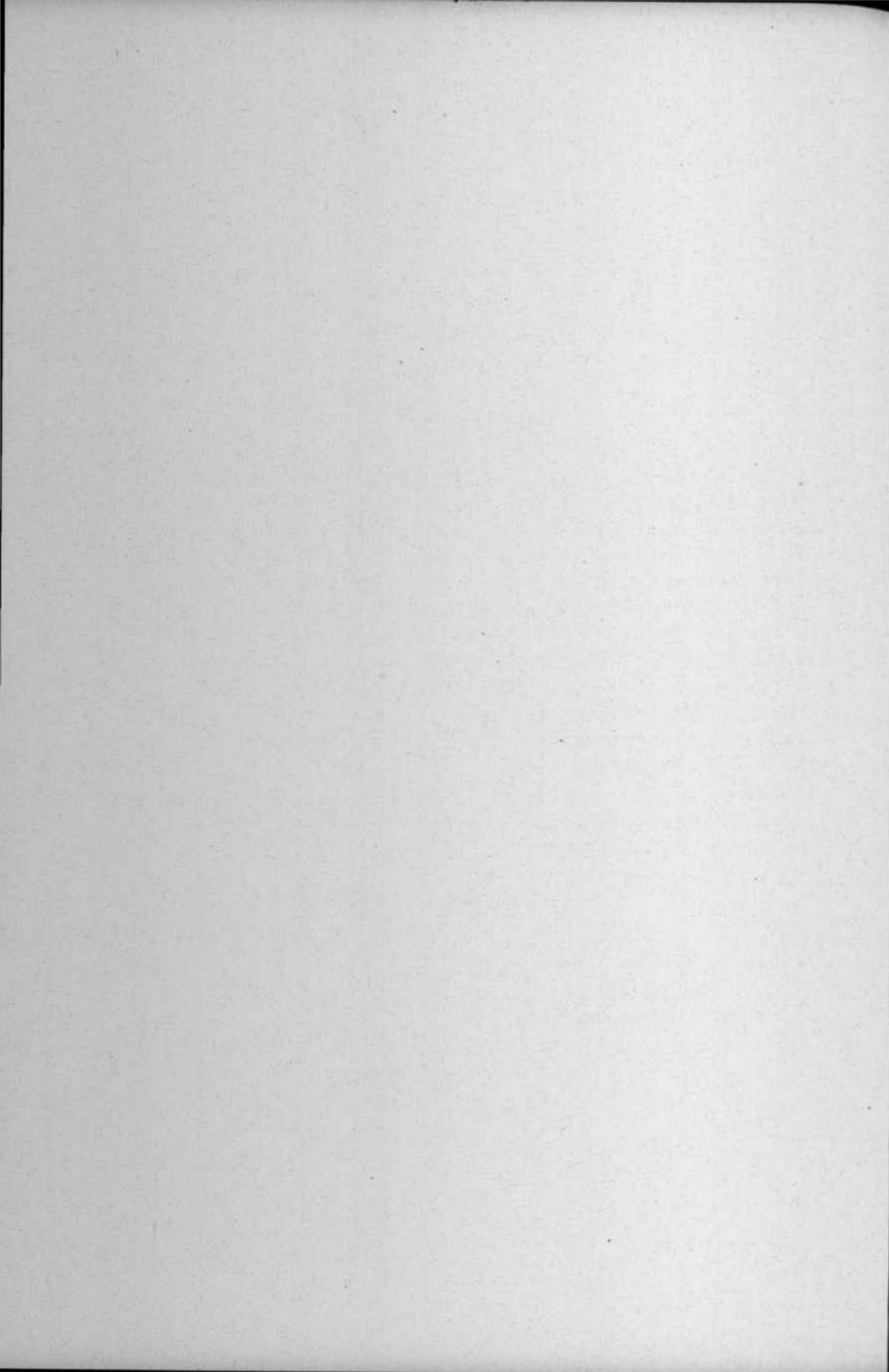


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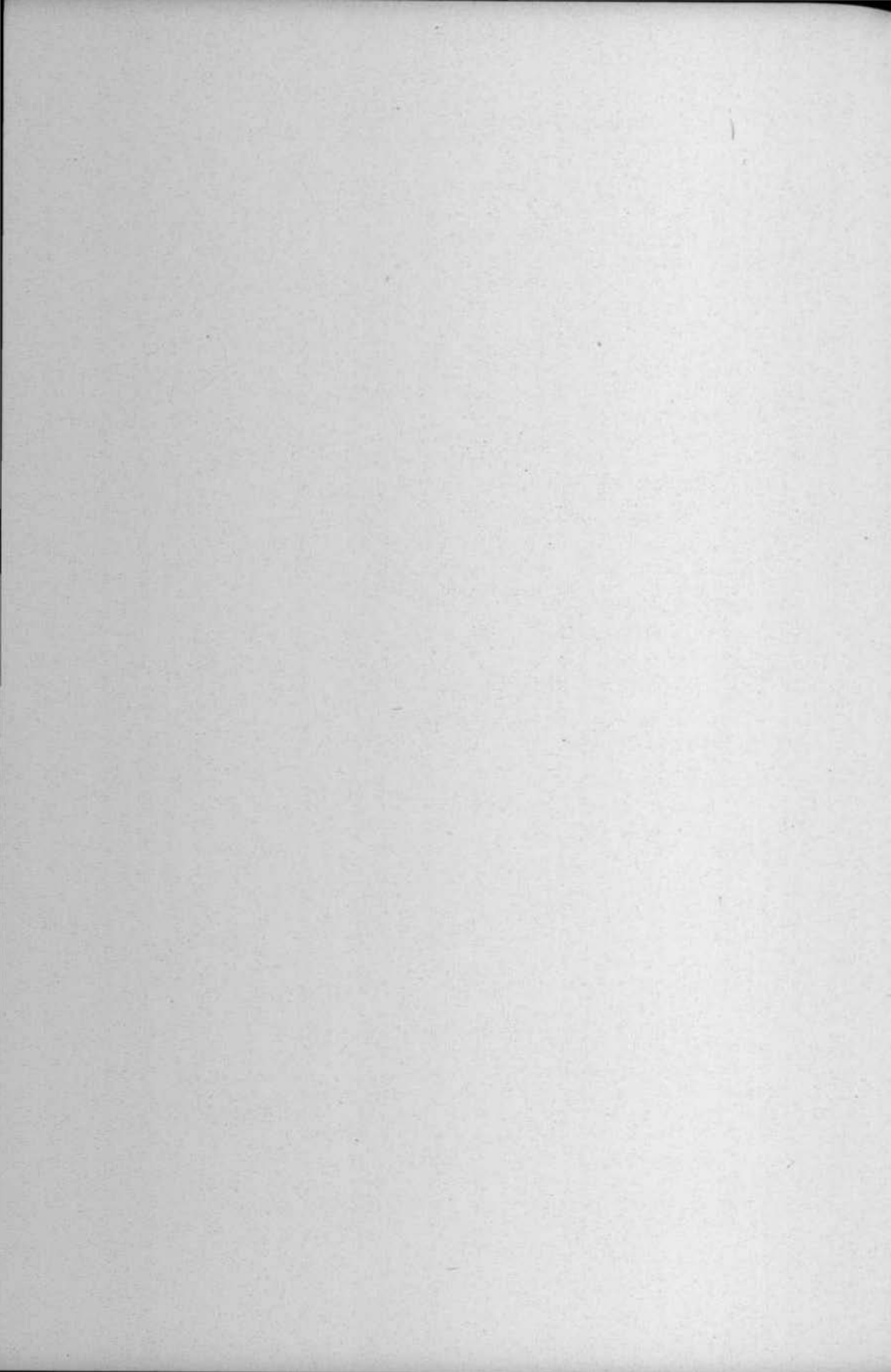
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*See opinion (041-30) rendered Feb. 3, 1941, repealing a portion of this opinion.

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CHAPTER I

APPROPRIATIONS

January 26, 1939—O-33.

COMPTROLLERS AUTHORIZED TO PAY EXPENSE OF ISSUING BENEFIT PAYMENT WARRANTS

Dear Sir:

This is in reply to your letter of January 25, 1939, reading as follows:

Subsection C of Section 10, Chapter 18402, Acts of 1937, provides for the issuing of warrants in payment of unemployment benefits by the Comptroller.

"There is estimated that there may be as many as 100,000 warrants per month drawn by the Comptroller in payment of benefits which will cost the Comptroller's Office a considerable sum of money to perform this duty. At the time of the making of the Budget for Salaries and Necessary and Regular Expenses of the Comptroller's Office this duty was not, by Statute, required as same was not passed until the 1937 Legislature.

"In view of the above stated facts please give me your opinion as to whether or not a portion of the appropriation made for the Comptroller's Office by the 1937 Legislature may be used for Salaries and Necessary and Regular Expenses required in the issuing of these warrants."

In my opinion to the Industrial Commission, dated August 4, 1938, I held that the Comptroller should issue the warrants for the payment of benefits. The duty of the Comptroller, to issue benefit payment warrants, is no different from his duty to issue any other State warrants. It is immaterial that Chapter 18402, Acts of 1937, had not been enacted at the time the budget for the Comptroller's Office was made up, for the appropriation made by the 1937 Legislature was not limited to, or earmarked for, only such expenses of the Comptroller's Office as were anticipated in the aforesaid budget. I am of the opinion that the Comptroller's expense, in issuing benefit payment warrants, may be paid out of the appropriation made for the Comptroller's office by the 1937 Legislature.

February 16, 1939—O-55.

AUTHORITY TO CONTRACT CURRENT BILLS AGAINST STATE

Dear Sir:

In your letter of January 31, 1939, to which is attached a letter from the Florida National Bank of Jacksonville, inquiring as to the status of *bills against the State* in favor of merchants, upon which that bank has been

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making loans, you ask to be advised whether you would be authorized to pay bills incurred by the State in the purchase of merchandise for use in this fiscal year, with moneys collected during the next fiscal year, without an additional or deficiency appropriation by the Legislature.

You also ask to be advised fully as to the effect of Section 9 of the Biennial Appropriation Act of 1937.

Section 4 of Article IX of the Constitution of Florida provides that no money shall be drawn from the Treasury except in pursuance of appropriations made by law. The power to enact laws is vested exclusively in the Legislature; therefore, the Legislature alone has the power and duty to make appropriations for the essential governmental functions.

Section 2 of Article IX makes it the duty of the Legislature to provide for raising revenue sufficient to defray the expenses of the State for each fiscal year, and it is to be presumed that the Legislature has and will continue to perform that duty.

In *Carlton et al. v. Mathews*, 103 Fla. 668, 137 So. 815, the Supreme Court of Florida, considering the requirement of Section 2 of Article IX of the Constitution, said:

"Section 2 of Article IX does not require every state expense to be fully paid each fiscal year; it merely commands the Legislature to provide for raising revenue sufficient to defray the expense of the state 'for each fiscal year,' whatever the expenses may be for that year. If all such expenses are not paid in one fiscal year, they may by law be made a part of the state expenses for the next current year without violating the Constitution, if no promise is made or obligation is assumed by or for the state to make continued or future payments. Statutes may limit state expenses to budgets for a fiscal year. See *Hathaway v. Munroe*, 97 Fla. 28, 119 So. 1499."

The above opinion was rendered October 28, 1931, and rehearing denied November 19, 1931.

Again in *State ex rel. Kurz v. Lee*, 121 Fla. 360, 163 So. 859, our Supreme Court said:

"Every appropriation by the Legislature for a State purpose, as set forth in a general appropriation act passed by the Legislature according to Section 30 of Article III of the Constitution, creates an authority of law in the official or department to whom or for which such appropriation is made, to incur an obligation on the State's part within the terms of the appropriation made, and entitles those who render services or furnish materials to the State thereunder to be paid in full for the services rendered or the materials furnished, and so are payable in full claims for the payment of which sums of money under general provisions of law providing for and requiring such sums to be paid to the person entitled out of the general revenues of the State, as the term 'current expenses of the State' comprehends any claim or demand enforceable by mandamus against the State's general revenue fund by reason of a legislative act of appropriation therefor,

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general or special. This is clearly contemplated by Section 2, Article IX of the Constitution."

The opinion in the last case was rendered October 22, 1935, and rehearing denied November 9, 1935.

Upon the basis of the requirement of Section 2 of Article IX of the Constitution of Florida, as so construed by the Supreme Court of Florida, the appropriation by the Legislature of 1937, Chapter 17707, created an authority of law for incurring obligations on the State's part for necessary and regular expenses in the maintenance and operation of the Florida State Hospital and the State Prison Farm and other State institutions therein provided for within the terms of the appropriations made, and entitles those who furnish materials to the State thereunder to be paid in full for the materials furnished within the amounts so appropriated.

The Supreme Court in considering the requirement of Section 2 of Article IX of the Constitution realized the element of uncertainty in the collection of revenue required to be raised to defray the expenses of the State for each fiscal year, and pointed out that the said provision of the Constitution does not require every State expense to be fully paid each fiscal year, but "if all such expenses are not paid in one fiscal year, they may by law be made a part of the State expenses for the next current year without violating the Constitution, if no promise is made or obligation is assumed by or for the State to make continued or future payments."

Obligations created pursuant to the biennial appropriation Act of 1937 for the necessary and regular expenses in the support and operation of State institutions within the limits fixed by said appropriation act, are morally binding upon the State, and if not paid within the current fiscal year because of insufficient revenue realized from the provision made therefor by the Legislature, it is to be presumed that the Legislature will make provision therefor as required by Section 2 of Article IX of the Constitution as construed by the Supreme Court.

I respectfully decline to advise as to the effect of Section 9 of Chapter 17707, Acts of 1937, the Biennial Appropriation Act, for the reason that the said section of said Act undertakes to vest in the Governor exclusively the power to put in operation and make effective the provisions thereof, and my opinion thereon would have the effect of advising in respect to a matter relating to the supposed power and duty of the Governor without his request therefor.

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April 19, 1939—O-157.

COMPTROLLER'S WARRANT TO BE MADE PAYABLE JOINTLY
TO ST. AUGUSTINE HISTORICAL PRESERVATION AND
RESTORATION ASSOCIATION AND GOVERN-
MENTAL BODY OF CITY OF ST. AUGUSTINE

Dear Sir:

In your letter of the 19th instant you state that the Budget Board has made available the sum of Five Thousand Dollars for use under the appropriation of Fifty Thousand Dollars provided for by Chapter 18146, Laws of Florida, Acts of 1937, appropriated to the St. Augustine Historical Preservation and Restoration Association, the expenditure of which said money is to be under the direction of the governmental body of the City of St. Augustine, and you ask to be advised whether it will be legal and proper for you to draw a warrant on the State Treasurer for the sum so made available in favor of the City of St. Augustine, and deliver such warrant to the Mayor of said City.

The appropriation is to the "St. Augustine Historical Preservation and Restoration Association," "the expenditure of such money to be under the direction of the governmental body of the City of St. Augustine, Florida," and the report of such expenditure to be made semi-annually to the Comptroller of the State of Florida."

Because of the peculiar wording of the Act and the absence of explicitness as to whom the appropriation shall be delivered and by whom the report is to be made, it is my opinion that your warrant should be made payable jointly to the "St. Augustine Historical Preservation and Restoration Association" and the governmental body of the City of St. Augustine, Florida. Just who constitutes the "governmental body" of the city is determinable from the City Charter.

May 31, 1939—O-288.

PARITY ACT—CHAPTER 19001—CONSTRUCTION RE: PAYMENT
FROM GENERAL REVENUE FUND OF STATE SALARIES
AND APPROPRIATIONS FOR SCHOOL SYSTEM

Dear Sir:

In reply to your inquiry of yesterday afternoon concerning the effect of the "Parity Act" upon the payment of state salaries and upon appropriations for the school system, with reference to your duties, my opinion is as follows:

The Parity Act, Chapter 19001, Acts of 1939, Senate Bill 82, was enacted to render effective Section 2 of Article IX of the Constitution of Florida, as amended by vote of the people at the general election in November 1938,

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and the validity thereof has not been questioned. It is your duty as an administrative officer to comply with said Act insofar as it affects your office.

That Act places state appropriations from the General Revenue Fund for the benefit of the uniform system of public free schools and the state institutions of higher learning on a parity with other appropriations from the General Revenue Fund, and makes it the duty of the Legislature to provide for raising revenues therefor, which duty the Legislature is presumed by law to have performed unless and until the contrary definitely appears.

Therefore, you should treat alike and on a parity all such appropriations from the General Revenue Fund, whether for the public school system or for other purposes.

In determining the revenue applicable thereto, you may properly consider funds yet to be received during the fiscal year and the provision that transfers of any other available funds may be made, in accordance with law, in order to meet lawful appropriations from the General Revenue Fund for the schools and for other state purposes, also actual treasury disbursements heretofore during the fiscal year for the respective appropriations, and earmarked funds.

In your letter you did not state the amount on hand in the General Revenue Fund, or the amounts of funds on hand or which may become available from other than normal sources.

Appropriations and the issuance of warrants are not to be confused with treasury disbursements.

It is primarily your duty upon appropriate demands to issue and present to the Governor, warrants upon the Treasurer for lawful appropriations. If an actual deficit in treasury funds occurs and the appropriations are lawfully diminished, then the appropriations for the school system are to be diminished under the Parity Act, but no more than the appropriations for current State expenses payable from the General Revenue Fund.

In such event, it appears by the opinions of the Supreme Court in *State ex rel. Kurz v. J. M. Lee*, as Comptroller, 121 Fla. 360; 163 So. 859, that a distinction may be made between disbursements for the essential functions of government and disbursements for other purposes, the determination of which would depend upon the particular exigencies as and when presented.

If the actual revenues prove insufficient to meet all the lawful appropriations payable therefrom, then it would become proper for preference to be given to necessary disbursements for the expenses of the essential functions of government, and, on the same basis, to appropriations for the school including the institutions of higher learning.

The foregoing in my opinion sums up the spirit and intention embodied in the constitutional and legislative provisions.

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May 4, 1940—O-657-1.

SECRETARY OF STATE AUTHORIZED TO EMPLOY DEPUTIES
IN CONNECTION WITH ELECTIONS UNDER SECTION
13 OF CHAPTER 18405, ACTS OF 1917*Dear Sir:*

This will acknowledge receipt of your letter of May 4th stating that:

"Section 13 of Chapter 18405, Acts of the 1937 Legislature provides that the Secretary of the State may, at any time that he deems fit, appoint one or more deputies to visit any county or municipality, or upon the petition of 5% of the registered voters of any county or municipality, shall appoint one or more deputies to visit such county or municipality. The compensation of such deputies shall be fixed by the Secretary of State and shall be paid from such portion of the General Revenue Fund of the State as is otherwise *unappropriated*."

You further advise me that the Honorable R. A. Gray, Secretary of State, has found it necessary to appoint a deputy in some instances to perform the duties required by this Section.

You request my opinion as to whether or not the appropriation mentioned in this Act authorizes the Comptroller to pay the salaries and expenses of such deputies in line with payment of salaries and expenses of other employees of the State which are payable from the General Revenue Fund of the State.

On November 20th, 1939, I gave an opinion to the Secretary of State with reference to this question and I have decided to review the same since receiving your request.

I have, therefore, again examined Section 13 of said Act and find in addition to the statement you made with reference to what said Section contains, the following which I believe to be very pertinent to the question involved:

"* * * Said deputy shall, under the direction of the Secretary of State, investigate and examine the condition, custody and operation of voting machines in such county or municipality. It shall be the duty of said deputy to supervise the preparation of such machines for election. It shall be unlawful for any person to obstruct said deputy in the performance of his duty. It shall be the duty of said deputy to file with the Secretary of State a report of his findings as to the condition, custody and operation of voting machines in such county or municipality. Said deputy shall also file a copy of such report with the Clerk of the Circuit Court of the county in which the machines he has investigated are situated."

From your letter I gather that you are doubtful as to whether the appropriation made in the Act is sufficient because the language used is somewhat different from that usually found in such Acts. The word "unappro-

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priated" is used, which you have underscored, rather than the usual words to be found in Acts of this kind of "hereby appropriated from any funds in the State Treasury not otherwise appropriated."

As I have said many times in construing the Acts of the Legislature, the cardinal principle to follow is to determine the intention of this Body. The preservation of our form of government depends primarily upon the ballot and it is, therefore, essential to preserve the purity thereof.

In reading Section 13 I am impressed by the words that the Legislature has used in placing the power in the Secretary of State to appoint deputies to ". . . investigate and examine the condition, custody and operation of voting machines in such county or municipality . . . to supervise the preparation of such machines for election," and the purpose of the other language of this Section is similar.

Obviously, the Legislature was attempting to surround the election machines and, therefore, the ballot with every possible safeguard, and that it was the intention of the Legislature that the Secretary of State could employ someone who would, of course, be a State employee to carry out the duties imposed by said Act and to pay the necessary compensation and expenses of such person. I cannot conceive that the Legislature intended in this instance to make it difficult or doubtful with regard to the payment of any deputy selected and employed by the Secretary of State.

Therefore, as used in this Section when taken into consideration with what I believe to have been the plain intent of the Legislature to safeguard and protect our election machinery, I attach no particular significance to the words used to appropriate the money necessary for the payment of the services to be performed thereunder.

I, therefore, am of the opinion that you are fully authorized to pay the salaries and expenses of such deputies from the General Revenue Fund in the same manner and to the same extent as payment of salaries and expenses of other employees of the State are made.

This necessarily modifies the last paragraph of my opinion of November 20th, 1939, and I, therefore, overrule said paragraph.

June 27, 1939—O-173-1.

STATE LIVE STOCK SANITARY BOARD TO INCLUDE BALANCE AS PART OF NEW FUND ALLOWED UNDER CHAPTER 19006, ACTS OF 1939

Dear Sir:

I am in receipt of your letter of the 24th, in which you state as follows:

"Chapter 19006, Acts of 1939 Legislature appropriated \$125,000.00 to the State Live Stock Sanitary Board for the purchase of Anti-hog Cholera Serum and Hog Cholera Virus. Section 3 of said Chapter provides as follows:

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"Section 3. For the purchase and distribution of anti-hog cholera serum and hog cholera virus the sum of One Hundred Twenty-Five Thousand Dollars (\$125,000.00) is hereby appropriated annually out of any funds in the State Treasury, including such sums as are now credited to the State Live Stock Sanitary Board in the Serum Fund."

"At the present time there is a balance from the sale of this serum in accordance with Chapter 18153, Acts of 1937 in the amount of \$4,486.82. Should this \$4,486.83 be transferred to the General Revenue Fund and only the \$125,000.00 mentioned in this Section be made available during the annual period or should they be entitled to \$125,000.00 plus \$4,486.83 during the annual period."

It is my opinion that this Act only appropriates annually the sum of \$125,000.00 for the purpose of purchase and distribution of anti-hog cholera serum and hog cholera virus and that the \$4,486.83 now on hand should be included as a part of this \$125,000.00 appropriation. I do not think it is necessary to make a transfer of the \$4,486.83 from a special fund to the General Revenue Fund, as you may use this sum to pay for the first purchases made under this Act.

The annual period began on May 1, 1939.

June 28, 1939—0-433.

STATE LABOR INSPECTION—SECTION 5961, C. G. L., 1927, CONSTITUTES A CONTINUING APPROPRIATION FOR SALARY AND EXPENSES

Dear Sir:

I am in receipt of your letter of the 27th in which you inquire as follows:

"Please give me your opinion as to whether or not Section 5961 Compiled General Laws of 1927 is a continuing appropriation and if same is not a continuing appropriation is there any law that authorizes the payment of salary and necessary and regular expenses of State Labor Inspector."

Section 5961, Compiled General Laws, 1927, is as follows:

"The said State labor inspector shall receive an annual salary of eighteen hundred dollars, payable monthly out of any moneys not otherwise appropriated, as other salaries of State employees, together with such necessary traveling expenses as may be incurred by him or her in making such trips of inspection not to exceed eight hundred dollars. The inspector shall also be allowed all office stationery and other expenses not to exceed two hundred dollars per year, such expenses to be paid out of any moneys not otherwise appropriated."

I am of the opinion that this section of the law does provide for a continuing appropriation for the salary and expenses of the State Labor Inspector. See *Amos v. Mosely*, 77 So. 619.

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August 8, 1939—O-5-19

STATE LIVE STOCK SANITARY BOARD—AMOUNT OF
APPROPRIATION*Dear Sir:*

I am in receipt of your letter of the 4th, in which you inquire as follows:

"It is requested that you refer to that portion of the Appropriation Act for 1939 covering the State Live Stock Sanitary Board and advise us if we will be permitted to expend the \$205,000.00 listed in three items, namely:

"Salaries	\$ 88,000.00
Necessary and Regular Expenses	112,000.00
For employment of additional veterinarians	5,000.00

or if we will be limited to the total of \$200,000.00 as set forth in the first paragraph of the Appropriation Act for this department."

That part of the Appropriation Bill dealing with the State Live Stock Sanitary Board provides as follows:

"LIVE STOCK SANITARY BOARD

"There is hereby appropriated out of General Revenue an amount which, when added to proceeds from Special Millage, will make up a total of \$200,000.00, of which for

"Salaries	\$ 88,000.00
Necessary and Regular Expenses	112,000.00
For employment of additional veterinarians	5,000.00
Bang's disease eradication, Tuberculosis eradication and reimbursement to cattle owners \$65,000.00 included in Necessary and Regular Expense."	

You will see that only the sum of \$200,000.00 is appropriated for this department and that the specific items listed in this part of the Appropriation Bill only direct the purpose for which the appropriation should be used and are not appropriations. It is therefore my opinion that your appropriation would be governed by the sum of \$200,000.00, the only amount that was appropriated to you for this department.

September 11, 1939—O-565.

AGRICULTURAL EXPERIMENT STATION—ITEMS PAYABLE
FOR "SALARIES" AND FOR "NECESSARY AND
REGULAR EXPENSES" (OPERATION)*Dear Sir:*

Under date of September 1, 1939, the Secretary of the State Board of Control handed me a letter reading as follows:

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"During the past several years the Legislative Appropriations for the Main Agricultural Experiment Station, Branch Stations and Field Laboratories have been made in one item. The 1939 Appropriations have been made in two items: Namely; for 'Salaries' and for 'Necessary and Regular Expenses' (operation).

"During the past several years it has been customary for the Station to charge the following expenses on its books as 'Necessary and Regular Expenses';

"I. Common labor—Employed in general farm work such as plowing, cultivating, hoeing, harvesting crops, clearing land, repairing fences, moving freight, feed, fertilizer, etc. For the most part colored laborers, although occasionally white men and white students are employed.

"A. Individuals employed only temporarily in unexpected emergencies, such as in repairing fire or store damage to buildings or crops.

"B. Employed for varying periods of time (as five days in one week, three days in another week, etc.) *as needed*, but not continuously employed in the sense of being paid for all regular working days in succession as they occur. As for example, Amos Crawford, colored, has performed one or more day's labor for the Experiment Station at some time or another during each month for the past five years. Namely, he has been employed *only* when his services were needed.

"2. Office Help When Employed by the Day or Week.—Employed for addressing envelopes, putting bulletins in envelopes, making addressograph stencils, mimeographing manuscripts, forms, and charts and/or taking dictation and transcribing it in the handling of correspondence, preparation of reports, manuscripts, etc.

"A. Strictly temporary when such work is greater in volume than can be handled by the regular salaried ('appointed') employees.

"B. Employed on probation or for training to meet the particular and exacting needs of the Experiment Station.

"3. Skilled and Semi-Skilled Labor.—Carpenters, mechanics, etc., engaged in the repair and upkeep of office and laboratory buildings, experimental equipment, animal cages, tractors, trucks, irrigation pumps and engines, spraying machines, and heating and electrical systems, etc.

"A. Temporary and intermittently employed; namely, their employment not contemplated or planned for until the occasion for their services actually arises.

"B. Employed more or less continuously month after month where there is sufficient repair and maintenance work always present to keep the worker employed from day to day and week to week.

"4. Scientific Assistants.—Engaged in helping members of the scientific staff and laboratories recording the detailed results (data) of fertilizer, variety, and spraying experiments, weighing and recording amount of crop

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produced on each of many plots in a field experiment, washing glassware, arranging and moving supplies in laboratory or from storeroom to laboratory and even performing routine laboratory operations such as filtering solutions, operating combustion furnaces, hot-air dryers, water stills, ignition chambers, etc. The greater majority of these are students employed during sessions of the University during such hours as they can spare from their classwork, but during vacations the same students are not infrequently hired to work 'full time.'

"A. Employed as needed and/or as their time is available and paid by the hour for the actual number of hours they work during any given week or month.

"B. Non-students employed continuously from week to week and, in rare instances, from month to month.

"The salaries of the regular scientific staff members were charged on the Station books as 'Salaries' and so considered in the report of the Board of Control to the State Budget Commission and to the Legislature.

"The Board of Control and the Station desires to continue this practice during the present biennium and wishes to know if, in your opinion, it has legal authority to pay the four items mentioned above from the 1939 Legislative Appropriation Made for 'Necessary and Regular Expenses.'

"A copy of a letter addressed to me August 26, 1939, by Dr. Wilmon Newell, Director of the Agricultural Experiment Station, and certain exhibits marked 'a,' 'b,' 'c,' 'd,' 'e,' 'f,' and 'g' are herewith attached for your information in connection with this proposition."

Section 4 of Chapter 19280, Laws of Florida, Acts of 1939, in part reads as follows:

"Any sum or sums appropriated for salaries, if not required for such purposes, may be applied to other necessary and regular expenses of the Department to which they are appropriated, but in no event shall any sum or sums specifically appropriated for expenses be applied to salaries."

In arriving at a proper determination of the question presented in your inquiry, it is necessary to understand and consider the legislative intent in making the appropriation here involved, with particular reference as to what was intended to be included within the classifications "Salaries" and "Necessary and Regular Expenses" ("operating").

Frankly, the Act itself throws no light on a solution of this important inquiry. But since it is a rule of construction recognized and used by our own Supreme Court, that the history of the times may be considered where necessary to arrive at a determination of legislative intent, I deem it proper to take in consideration such matters and acts preceding the appropriation under consideration which have reference thereto, as well as the operations of the Department for which the appropriation was made.

The Legislature has created a Budget Commission (Section 1366, Com-

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piled General Laws). By Section 1373, Compiled General Laws, the Budget Commission is required within five days after the beginning of each regular session of the Legislature to submit to the presiding officer of each house printed copies of the budget based on their own conclusions and judgment, containing a complete and itemized plan of all proposed expenditures for each State Department, bureau, division, officer, board, commission, institution, or other agency or undertaking, classified by function, character, and object.

In submitting its budget and request for appropriation to the Agricultural Experiment Station to the Legislature of 1939, the Budget Commission gave a detail of annual salaries, making up the total amount requested as "Salaries" for said Department, but the detail as to necessary and regular expenses in the requested appropriation had reference to the places where the Department's operations are carried on, which included the main station, field laboratories, and special items in particular counties. The work of this Department is, as the name implies, experimental, and consists in a large part in the investigation of diseases affecting certain crops, and also of methods of improving certain crops.

In the administration of the Department, as in other Departments of the State government, a personnel of trained technicians and other employees are required and kept on a year-round basis, and this fact was, of course, well known to the Legislature when it made the appropriation in question. It is also a fact which must have been well known to the Legislature, and which enters into a determination of legislative intent, that in the execution of the experiments by the Department, other classes of services are required such as those outlined in your letter, the exact extent of which was not and could not have been known to the Budget Commission in making up the detail of its requested appropriation for the Department, nor to the Legislature at the time of making the appropriation in question; yet these classes of services are essential in the operation of the Department, and without them the work of the Department would be seriously crippled if not entirely destroyed in its usefulness to the public.

The fact that the Legislature gave the Department all that was requested by the Budget Commission, evidences a legislative intent not to cripple the Department in its operations, but on the other hand, it is apparent that the Legislature rather intended to extend the usefulness of the Department as evidenced by the fact that in some instances certain items in the budget of requested appropriation were increased.

On the basis of these considerations, I am of the opinion that there is legal authority for the payment of work and services enumerated and defined in Paragraphs numbered 1, 2, 3, and 4 of your said letter, from the appropriation to the said Department for "Necessary and Regular Expenses" ("operating"), and that it is unnecessary for me to enter into a detailed discussion as to each classification of services so itemized in your letter.

APPROPRIATIONS

September 23, 1939—O-575.

STATE AGRICULTURAL MARKETING BOARD—CHAPTER 13809,
ACTS OF 1929—CHAPTER 15860, ACTS OF 1933*Gentlemen:*

This is in reply to your joint request for my opinion concerning substantially the following problem:

Chapter 13809, Laws of Florida, Acts of 1929, created a State Agricultural Marketing Board and defined its powers and duties and, in Section 3, provided for an appropriation in the following words:

"Section 3. That the sum of Thirty-five Thousand Dollars be and the same is hereby annually appropriated out of the General Inspection Fund to defray the *expenses necessary in carrying out the provisions of this Act.*" (Italics ours.)

In Chapter 15860, Laws of Florida, Acts of 1933, Section 1 of said Chapter 13809 was amended. By this amendment, there was added to the language of Section 1, as originally enacted, language authorizing the State Agricultural Marketing Board to purchase suitable sites and erect thereon assembling plants and properly equip same for the handling of various crops, meats and dairy products. There was also added the following:

"The funds necessary to defray the expense of erecting and equipping the plant or plants shall be expended from the General Inspection Fund: Provided that only such funds shall be used for the erection of these plants as are available after all other needs of the Department of Agriculture have been provided for as per appropriation during each fiscal year."

Does the above provision added by amendment to Section 1 of Chapter 13809, provide for a appropriation in addition to that set forth in Section 3 of the original Act?

In determining the legislative intent, it is important to notice that the title of Chapter 13860, Acts of 1933, specifically contains the words, "Making Appropriations Therefor." Section 2 of 13860 provides that all laws and parts of laws in conflict with that Act are repealed. It would seem therefore that in the event of a conflict between the provisions of Section 1, as amended, and Section 3, as originally set forth, the intent expressed in Section 1, as amended, should prevail.

It is my opinion, however, that there is no real conflict. The appropriation in Section 1, as amended, is for the specific purpose of erecting and equipping the plant or plants referred to therein. The appropriation made by Section 3 of the original Act was a general appropriation for carrying on the general functions of the State Agricultural Marketing Board.

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October 18, 1939—O-612.

**PAYMENT OF BILLS FOR FREE TEXT BOOKS CONTRACTED
DURING 1937-1939—AUTHORIZED***Dear Sir:*

Under date of October 11, 1939, you inquired whether an unexpended balance of \$19,695.46 remaining in the General Revenue Fund from the 1937-39 appropriation for free text books may lawfully be used during the 1939-41 biennium for the payment of bills contracted for text books during the 1937-39 biennium.

The Legislature of 1937 appropriated for free text books a sum not to exceed \$200,000.00 to augment proceeds from special millage. The Act provided:

"Section 5. That any moneys appropriated by this Act for a designated period which, at the end of such period, remain unexpended or not contracted to be expended, the said unexpended balance may be used for like purposes in the second year of the biennium but whatever balance remains unexpended or not contracted to be expended at the end of the biennium the same shall revert to the fund from which appropriated." Chapter 17707, Acts of 1937, pages 16 and 19, Sections 1, 5.

Under that Act it is my opinion that the unexpended balance of said appropriation may be applied during the present biennium to the payment of bills for free text books duly and lawfully contracted during the 1937-39 biennium.

November 20, 1939—O-657.

**SECRETARY OF STATE AUTHORIZED TO EMPLOY DEPUTIES
TO INSPECT VOTING MACHINES***Dear Sir:*

Under date of November 16, 1939, you call attention to part of Section 13, Chapter 18405, Acts of 1937, relating to appointment of deputies for the inspection of voting machines in elections, which reads:

"The compensation of such deputies shall be fixed by the Secretary of State and shall be paid from such portion of the general revenue fund of the State as is otherwise unappropriated";

And you inquire whether said Act made an appropriation for the payment of the compensation of such deputies.

It is my opinion that said Act did make an appropriation for the compensation of such deputies. Constitution, Article IX, Section 4; State v. Allen, 85 Fla. 214, 91 So. 104; 59 C. J. 248.

However, since the Act provides that such compensation be fixed by the Secretary of State, and all claims for issuance of warrants are subject to

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audit by the Comptroller, it is my suggestion that the number of such deputies and the amounts of their compensation be submitted for approval by the Comptroller before they perform any service, and your attention is directed to the fact that the appropriation is made contingent upon the general revenue fund not being entirely appropriated for other purposes. That is, the possibility of funds not being available for said purpose if specific appropriations for designated purposes consume the entire funds, as I believe specific appropriations would take precedence in payment.

January 16, 1940—O-720.

AGRICULTURAL EXPERIMENT STATION—WHEN MONEY MAY
BE USED FOR RESEARCH WORK

Dear Sir:

In your letter of the 15th instant you refer to the following items in the General Appropriation Act of 1939, being Chapter 19280, under the heading, "Agricultural Experiment Station," as follows:

	<i>Salaries</i>	<i>Operating</i>	<i>Total</i>
"Potato Disease Investigations	\$7,600.00	\$2,400.00	\$10,000.00
Laboratory at Hastings		2,000.00	2,000.00",

and to the fact that these items represent a total increase of \$4,000.00 over the corresponding appropriation of 1937.

You thereupon state that the Board of Control has authorized the release of the increase of \$4,000 for research work in Irish potatoes and other vegetable crops in the potato section around Hastings in this State, subject to the approval of the State Budget Commission, but before submitting this request to the State Budget Commission for approval, the Board of Control desires my opinion as to whether a part of the money appropriated under the item, "Potato Disease Investigations," can be used for research work in vegetable crops other than potatoes.

I note that in the preceding paragraph it is proposed to use this increase "for research work in Irish potatoes and other vegetable crops in the potato section."

Section 4 of Chapter 19280 provides that any sum or sums appropriated for salaries, if not required for such purposes, may be applied to other necessary and regular expenses of the Department to which they are appropriated.

Section 5, after providing that any moneys appropriated by the Act for a designated period, which at the end of such period remain unexpended and not contracted to be expended may be used for like purposes in the second year of the biennium and that whatever balance remains unexpended and not contracted to be expended at the end of the biennium shall revert to the fund from which appropriated, further provides that any unexpended surplus money remaining to the credit of any board or commission from the moneys appropriated therein as shown by the records of the Comptroller at the end of

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each biennium, may upon recommendation of the Comptroller with the approval of the Governor be transferred to the General Revenue Fund, and also provides "that no funds appropriated for use by the State Board of Control, or for institutions under the control and management of the State Board of Control, shall be transferred to the General Revenue Fund or in anywise be affected by the preceding proviso."

The Agricultural Experiment Station is of course under the control and management of the State Board of Control, and when the provisions of Sections 4 and 5 of the Act are read together, there is indicated a legislative intent to vest in the Board of Control discretion in directing the work of the Agricultural Experiment Station in the investigation of plant diseases, to the extent of including therein other plants of like character or class, so long as the work of investigating diseases of the particular plant named is carried out as intended by the Legislature, and so long as the appropriation is not exceeded.

It is my opinion, therefore, that a part of the money appropriated under the item, "Potato Disease Investigations," may be used for research work in vegetable crops other than potatoes, if in the judgment of the Board there exists a need for such research or investigation, and if in fact the work of potato disease investigations does not require the expenditure of all of said appropriation made therefor.

June 12, 1940, O-823.

LIBRARY BOARD—APPROPRIATION

Dear Sir:

You call my attention to the appropriation contained in the General Appropriation Bill enacted by the Legislature of 1939, relating to salaries for employees of the State Library Board. By reason of the fact that a WPA Library Project provided a capable person paid from Federal funds during the first year of the biennium, only \$5100 of the \$6300 appropriated for salaries was used. You request my opinion as to whether the State Library Board can use the unexpended balance of \$1200 during the fiscal year, 1940-41.

Your question is answered in Section 5 of the General Appropriation Act (Ch. 19280, Acts of 1939). It is provided in said Section 5 that any moneys appropriated for a designated period, which remain unexpended at the end of such period, may be used for like purposes in the second year of the biennium. Any balance remaining at the end of the second year of the biennium, however, shall revert to the fund from which it was appropriated.

CHAPTER II

BANKS AND BANKING

February 11, 1939—O-46.

AUTHORITY OF BOARD OF DIRECTORS—ASSUMING ANOTHER BANK'S LIABILITIES IN EXCHANGE FOR SECOND BANK'S ASSETS

Dear Sir:

This is in reply to your letter of February 2nd in which you request my opinion as to whether or not a State bank operating under the laws of Florida must obtain the approval of its shareholders in entering into an agreement with another bank to assume the second bank's liabilities for and in consideration of a transfer of the second bank's assets, or whether or not the Board of Directors has the legal right to enter into such a contract.

To begin with, in each particular instance the charter of the purchasing bank should be carefully analyzed to ascertain whether there is any specific provision dealing with the question at hand. In the absence of any specific provision it is my opinion that a bank, acting through its Board of Directors, has authority to assume the liabilities of another bank in exchange for its assets without submitting its action to the stockholders.

Such action on the part of a bank would be in effect a consolidation of two banks, which is authorized under Section 6113, Compiled General Laws (4172 R. G. S.). Such a consolidation must be approved by the Comptroller and shall not operate to defeat the claim of any creditor or hinder any creditor in the collection of his debt against such consolidated banks or either of them. Since there is no statute requiring such action to be submitted to the stockholders the general rule applies that banks, like other corporations, function through Boards of Directors. The following is from 3 R. C. L., 438-439:

"The bank, as a corporation, acts through its governing body, the board of directors, unless otherwise provided by law. The board of directors, however, must act as a body. An individual director, as such merely, is not clothed with any power to bind the bank by his acts or statements, and the assent or determination of even a majority of the directors acting separately and individually is not binding upon the bank."

I am advised that in the particular case concerning which you now inquire a State bank is taking over the assets and liabilities of a National bank in the same community which is suspending business. I do not find any provision in the charter of this particular State bank requiring the matter to be submitted to the stockholders so that it would necessarily follow that the Board of Directors has the power to effect the consolidation in the manner proposed.

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April 11, 1939—O-142.

**INVESTMENT OF FIDUCIARY FUNDS AUTHORIZED, CHAPTER
17949 AND CHAPTER 17980, LAWS OF FLORIDA,
ACTS OF 1937***Dear Sir:*

You request my opinion as to whether or not Federal Land Bank bonds and National Mortgage Association securities are eligible for the investment of fiduciary funds under the statutes of Florida.

I call your attention to the fact that Section 1 (E) of Chapter 17949, Laws of Florida, Acts of 1937, authorizes executors, administrators, trustees, and guardians holding funds to be invested may invest such funds in "the bonds or other interest-bearing obligations of any Federal Land Bank organized under any Act of Congress enacted prior to the passage of this Act, provided such bank is not in default in the payment of principal or interest on any of its obligations at the time of making the investment." I further call your attention to Section 2 of Chapter 17980, Laws of Florida, Acts of 1937, which provides that it shall be lawful for banks, savings banks, trust companies, building and loan associations, insurance companies, trustees, guardians, executors, administrators and other fiduciaries to invest their funds and the moneys in their custody or possession "in securities issued by national mortgage associations."

It would therefore appear that there is specific statutory authority for the investment of fiduciary funds in both Federal Land Bank bonds and National mortgage associations.

August 9, 1939—O-518.

**AMERICAN BANK & TRUST COMPANY OF ST. PETERSBURG,
CANCELLATION OF MORRTGAGE***Dear Sir:*

I note from your letter of the 7th instant that this bank failed on April 25, 1930, and the liquidation of its affairs was completed on July 19, 1938, and the Liquidator discharged. I note also from the correspondence attached to your letter that it has come to your knowledge since the discharge of the Liquidator that certain mortgages held by said bank have been paid prior to the time it was taken over by you for liquidation, but that the bank failed to cancel said mortgages of record as required by law. The subject of your inquiry is as to the proper procedure for having such mortgages cancelled now that the affairs of the bank have been closed and the Liquidator discharged.

It seems to me that relief could be had by the mortgagor filing a bill in equity setting up the essential facts to which you would file an answer dis-

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closing the facts shown by the bank's records upon which the Court could decree the mortgage satisfied and without any further effect upon the title of the mortgaged property.

January 31, 1940—O-725.

SMALL LOAN ACT—AUTHORITY OF LICENSEE TO MAKE LOANS
IN EXCESS OF \$300.00 AT A RATE OF INTEREST
NOT EXCEEDING TEN PER CENT

Dear Sir:

You request my opinion as to whether or not a licensee, under Chapter 10177, Laws of Florida, Acts of 1935, known as the Small Loan Act, can lawfully make loans of amounts in excess of \$300.00, so long as he does not charge a rate of interest exceeding 10% on amounts over \$300.00. In other words, if "A" has borrowed \$300.00 from a small loan licensee, can he borrow an additional amount from the same licensee at a rate of interest not exceeding 10%?

The Small Loan Act was designed to overcome certain prevalent evils relating to lenders of "small" amounts. Many of the statutes in various States, relating to the licensing of lenders of small amounts, expressly prohibit licensees from making loans to any one individual exceeding a stated amount, usually \$300.00. Under the Florida Small Loan Act, however, licensees are *permitted* to make two distinct types of loans: first, amounts not exceeding \$300.00 upon which they may charge interest at a rate not exceeding 3½% per month; and, second, other loans, not limited in amount, upon which they may charge interest at a rate not exceeding 10% per annum. These two types of loans must be kept entirely separate and apart from each other.

It would be an evasion of the intended limitations of the Small Loan Act, if licensees were to be permitted to make one loan in excess of \$300.00 and, as a subterfuge, break up that loan into what would appear to be two separate transactions, charging 3½% per month on the first \$300.00 and 10% per annum on the balance. To permit this would result in authorizing loans of more than \$300.00 at interest rates far exceeding the limitations prescribed by statute. For instance, on a single loan of \$1,000.00 simply by splitting this into two separate transactions, the first \$300.00 would draw interest at the rate of 42% per year, to-wit, \$136.00, and the balance of \$700.00 at the rate of 10% per year, to-wit, \$70.00. The aggregate interest on the \$1,000.00 would be \$196.00, amounting to 19.6%. No case we have been able to find goes further than to permit amounts to be loaned at the general statutory rate where such loans are entirely separate from other loans to the same individuals of \$300.00 or less at the rate of 3½% per month. See *Rouse v. Jennings*, 249 N. W. 10.

It would be my opinion that a single loan for an amount exceeding \$300.00 can not be made at a rate of interest exceeding 10% per annum,

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simply by dividing the transaction into two apparently separate transactions. It is my further opinion, however, that if a loan of \$300.00 is made at a rate of interest not exceeding $3\frac{1}{2}\%$ per month, this does not bar the licensee from making another loan to the same individual at a rate of interest not exceeding 10% per annum, so long as it can clearly be established that the second loan is a transaction completely independent from the first loan. Whether the second loan is a completely independent transaction would depend upon the peculiar circumstances of each case.

March 28, 1940—O-773.

AUTHORITY OF STATE BANKS TO GIVE SECURITY FOR DE-
POSITS MADE BY A HOUSING AUTHORITY ORGAN-
IZED PURSUANT TO STATUTES OF FLORIDA—
CHAPTERS 17981 AND 17983, ACTS OF 1937—
SECTION 4147 REVISED GENERAL
STATUTES, AS AMENDED

Dear Sir:

This is in reply to your letter of March twenty-fifth, in which you request my opinion as to whether or not a state bank can pledge its assets to secure deposits of the "City of West Palm Beach Housing Authority."

Section 4147, Revised General Statutes 1920, (Section 6079 C. G. L.) as amended, authorizes the Comptroller to designate state banks as depositaries of "public money." The Comptroller must require such banks so designated as depositaries to give satisfactory security for the safe-keeping and prompt payment of the "public moneys" deposited with them.

To determine whether a state bank would be authorized, under the statutory provisions above referred to, to give collateral security for deposits made by "The Housing Authority of the City of West Palm Beach, Florida," it is necessary to determine whether the funds of this corporation are "public money." I find no court decision directly in point. It would seem to me, however, that the question of whether or not the funds of such corporation are "public money," must depend upon whether such a corporation is a public corporation, organized to serve a public, as distinguished from a private, purpose.

It is my opinion that a housing authority organized pursuant to Chapter 17981, Laws of Florida, Acts of 1937, is a public corporation organized to accomplish a public objective. Such a corporation has the power of eminent domain (Section 12 of Chapter 17981); its property is exempt from taxation (Section 2, of Chapter 17985). The Legislature has specifically declared such a corporation to " * * * constitute a public body corporate and politic, exercising the public and essential governmental functions set forth in this law * * * " (Section 8 of Chapter 17981). The Legislature has found in

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the Act authorizing the organization of housing authorities, " * * * that the assistance herein provided for the remedying of the conditions set forth in the Housing Authorities Law constitutes a public use and purpose and an essential governmental function for which public moneys may be spent * * *."

In the case of *Marvin v. Housing Authority of Jacksonville*, 183 So. 145, the Supreme Court of Florida overruled the contentions there made that housing authorities exist for private rather than public purposes. The Supreme Court upheld the right of such a corporation to acquire property by eminent domain and further sustained its right to exemption from taxation.

It is my opinion, therefore, that the funds of a housing authority, such as the one here involved, are "public money" within the provisions of Section 4147, Revised General Statutes (Section 6070 C. G. L.) as amended, so as to authorize a state bank to secure such deposits.

CHAPTER III

COUNTY OFFICERS

SECTION 1

Board of Public Instruction

April 25, 1939—O-159.

ADJUSTMENT OF ACCOUNTS UNDER FUTCH ACT—SECTION 7 OF CHAPTER 16252, ACTS OF 1933

Dear Sir:

You request my opinion concerning the proper method of adjusting accounts by the Board of Public Instruction of Pinellas County, under Chapter 16252, Laws of Florida, Acts of 1933 (Futch Law).

Pursuant to Chapter 18790, Laws of Florida, Acts of 1937, all bonds accepted by the Clerk of the Circuit Court of Pinellas County under the Futch Law were cancelled and were returned to the tax units by which they had been issued.

My attention has been called to the final decree in a case recently pending in the Circuit Court of Pinellas County, in Chancery, in which the Board of Public Instruction of Pinellas County was plaintiff and Arthur J. Jordan was defendant. This was a suit for a declaratory decree. The Court ruled that the rights and equities due the respective Maintenance Accounts and Interest and Sinking Funds Accounts of the several Special Tax School Districts and the General Fund of the Board of Public Instruction of Pinellas County had become vested prior to the enactment of Chapter 18790 and that the cancellation of said bonds did not affect the aforesaid vested rights.

In view of this final decree, the status of the matter is substantially the same as though Chapter 18790, Acts of 1937, had never been enacted. In view of this final decree, it would seem that the method for adjusting accounts referred to in my opinion dated May 20, 1938, and reported at page 179, of the Biennial Report of the Attorney General for the years 1937-38, would be applicable to the adjustment of accounts by the Board of Public Instruction of Pinellas County.

In making the distribution and adjustment among various accounts, the equities of particular accounts are to be determined as though the bonds represented actual cash. In other words, it is necessary to determine what particular amounts would have been received by the various accounts, if the taxes had been paid in cash rather than by bonds.

The particular problem involved is whether, in making the adjustment between accounts, the Board of Public Instruction may transfer from the Interest and Sinking Funds to the Maintenance Funds the proportionate part

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of the taxes that would have been paid to the Maintenance Funds if the tax had been paid in cash rather than bonds, but which would actually amount to an over-payment to the Interest and Sinking Funds if the bonds were to be cancelled. It is my opinion that accounts may be adjusted by the transfer of moneys from the Interest and Sinking Funds to the Maintenance Funds whenever by so doing the accounts may be properly balanced with one another.

June 20, 1939—0-391.

EMPLOYMENT OF TRUSTEE AS ARCHITECT ON DISTRICT
SCHOOL PROJECT—SECTIONS 375, 5338,
AND 5340, R. G. S. 1920

Dear Sir:

This is in reply to your letter of June the 17th.

You enclose a copy of a letter addressed to you from Mr. James T. Wilson, County Superintendent of Public Instruction of Dade County. You request my opinion concerning substantially the following state of facts: Some months ago, the County Board of Public Instruction of Dade County secured a Federal Government grant and loan for the purpose of constructing certain additions to the public schools in Miami Beach Special Tax School District No. 14. It was necessary to have an architect, and in the opinion of the Board, there were only two architects who were familiar with school architecture. The architect regularly employed by the Board, for personal reasons, was unwilling to work on the particular projects involved. The other architect, and the only one available who is an experienced school architect, is one of the Trustees of Special Tax School District No. 14. The objection has been made that under the provisions of Sections 575, 5338, and 5340, Revised General Statutes of Florida, 1920 (Sections 716, 7471, and 7475, C. G. L.), such employment of a Trustee is illegal.

Section 575 provides that, " * * * the Trustees shall make no contract with any of its members embracing any monetary consideration." Section 5338 makes it a criminal offense for any State or County officer to purchase supplies or materials for public use from himself or any firm or corporation in which he is interested, or in any manner, share in the proceeds of such purchase. Section 5340 makes it a criminal offense of any State or County officer or member of any State or County Board to bid for, or enter into, or be in any manner interested in, any contract for public work for which the said officer or State or County Board is, or may be, a party to the letting.

Under the facts above stated, the County Board of Public Instruction, and not the Board of Trustees of Special Tax School District No. 14, entered into the contract with the architect. It would therefore follow that there was no violation of Sections 575, 5338, and 5340, Revised General Statutes

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of Florida. In view of the fact that this contract was entered into before the enactment of the new School Code, any provisions to the contrary in the School Code, would have no application to the particular problem here involved.

November 20, 1940—O-989.

**RIGHT TO DEDUCTION PREMIUMS FOR GROUP INSURANCE
FROM SALARIES OF SCHOOL TEACHERS; FROM PORTION
OF SALARIES PAID FROM COUNTY OR DISTRICT
FUNDS; FROM PORTION PAID FROM
TEACHERS SALARY FUND**

Dear Sir:

You propound two questions with regard to the right of a County Board of Public Instruction, upon authorization of teachers employed by said Board, to deduct from the salaries payable each month the premiums for group life insurance. The questions are:

() Can the county board make such deductions and pay such premiums from the portion of the salaries paid from county or district funds?

(b) Can the county board make such deductions and pay such premiums from that portion of the salaries paid from the Teachers Salary Fund?

Answering the first question, it is my opinion that the County Board would be authorized to make such deductions for group insurance premiums from the portion of salaries payable to teachers from county and district funds. Answering the second question, it is my opinion that such deductions cannot be made from that portion of salaries payable from the Teachers Salary Fund. The making of such deductions would be prohibited by the following provision appearing in Section 1012 of the School Code:

"No warrants shall be drawn against the instructional salary portion of the Teachers Salary Fund allotted to any county save and except for the purpose of paying the salaries of properly certificated instructional personnel under contract in the public schools of such county during the current school year or for the previous year as prescribed by law."

I also call your attention, in this connection, to the following provisions of Section 1011 of the School Code:

"It shall be the responsibility of the State Treasurer to keep all accounts required for the fund as prescribed below: to prescribe, in cooperation with the State Superintendent, the form of warrant to be used by County Boards in making expenditures from the fund: Provided that warrants used for instructional salaries shall have the words 'Teachers' Salaries' plainly printed on the face of the warrant * * *."

SECTION 2

County Officers — Clerks of Circuit Court

January 11, 1939—O-72.

ADMISSIBILITY OF COMPTROLLER'S STATEMENT IN SUIT
AGAINST DELINQUENT CLERK AND SURETIES ON BOND*Dear Sir:*

This is in reply to your letter of December 29, 1938, in which you asked for my opinion as to whether or not the certified statement of the Comptroller, mentioned in Sections 1345, 1346 and 1347, Compiled General Laws of Florida, 1927, would be admissible in evidence against the sureties in the case of Fred P. Cone, Governor v. Maryland Casualty Company and George F. McCall, former Clerk of the Circuit Court of Dade County. Your letter also states that if this certificate is not admissible, it will be rather difficult for the State to prove its case, as McCall destroyed most of his records.

Section 1346 states in part that "the State Attorney shall institute suit for the recovery of the same," (meaning the balance reported to be due the State). Section 1347 reads in part as follows:

"In every case of delinquency where suit has been or shall be instituted, the statement in the last section aforesaid, certified as aforesaid, shall be admitted as evidence and shall be prima facie proof of the facts therein stated."

You will notice that Sections 1346 and 1347 were the original Sections 1 and 2 of a statute passed in 1832, and that Section 1345 was enacted in 1835. I believe that the above quoted language is broad enough to permit the introduction of the certified statement in evidence against the surety company. However, if the Court refuses to allow the statement in evidence, and the State does not have sufficient other evidence to prove the State's case, it would probably be advisable to take a nonsuit with bill of exceptions, pursuant to the provisions of Section 4617, Compiled General Laws of Florida, 1927. Thus the question could be decided by the Supreme Court, without the danger of a conclusive final judgment against the State on the merits, in the event that the Supreme Court held the certified statement inadmissible in this proceeding.

January 16, 1939—O-5.

COMPENSATION—CHAPTER 15974, ACTS OF 1933, CHAPTER 16925,
ACTS OF 1935, C. G. L. SECTION 2865, ET SEQ.*Dear Sir:*

This is in reply to your letter transmitting a letter of Messrs. Huffaker & Edwards, attorneys for J. D. Raulerson, former Clerk of the Circuit Court of Polk County, containing certain statements of fact concerning the accounts of Mr. Raulerson. You ask to be advised as to the proper treat-

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ment of the items as a guide to you in preparing a report on his accounts. In advising you I will assume the correctness of the facts contained in that letter and hereinafter restated. The accounts of J. D. Raulerson, Clerk of the Circuit Court of Polk County were short \$425.22 for the year 1934, \$432.20 for the year 1935 and \$50.76 for the year 1936 because of errors, undercharges and other irregularities.

During the year 1934 Mr. Raulerson accounted for excess fees under Chapter 15974, Acts of 1933 and accepted the salary of \$4,250 provided for by this Act. This statute was declared unconstitutional by the Supreme Court of Florida on March 25, 1935, in the case of *State ex rel. Henderson v. Foley*, 118 Fla. 885, 160 So. 522.

Mr. Raulerson operated his office for the first six months of 1935 under Chapter 11954, Acts of 1927, Section 2865, et seq., Compiled General Laws of Florida, 1927, and received compensation of \$3,750 for that six months' period. In 1935, the Legislature passed Chapter 16925 and this statute going into effect July 1, 1935, fixed the salary of the Clerk of the Circuit Court of Polk County at \$4,800 annually. This statute was likewise declared unconstitutional by the Supreme Court of Florida on May 26, 1938, in the case of *State ex rel. White v. Foley*. Mr. Raulerson operated his office during the last six months of 1935 and in the year 1936 under Chapter 16925, Acts of 1935, at a salary of \$4,800 per year.

The fees earned by the Clerk of the Circuit Court of Polk County during the years 1934, 1935 and 1936 were ample to pay the Clerk a full compensation of \$7,500 annually as provided by Chapter 11954, Acts of 1927, Section 2865, et seq. Compiled General Laws of Florida, 1927. The difference between compensation received by Mr. Raulerson during the year 1934 as provided by Chapter 15974, Acts of 1935 and that provided by the general statute was \$3,300. The difference between compensation received by him during the year 1935 the first six months under the general statute and the last six months under Chapter 16925, Acts of 1935 was \$1,350. The difference in compensation for the year 1936 provided by the general statute and that provided and accepted under Chapter 16925, Acts of 1935 was \$2,700.

It is the contention of Mr. Raulerson that he is entitled to have the above amount of \$425.22 credited on the deficiency in compensation of \$3,300 for the year 1934; the amount of \$432.20 credited on the deficiency in compensation of \$1,350 for the year 1935, subject to proration under Section 2865, Compiled General Laws of Florida, 1927; and the amount of \$50.76 credited to the deficiency of compensation of \$2,700 for the year 1936.

If the State is to attempt to enforce the payment of these amounts the basis of the claim must necessarily be the unconstitutional statutes, for admittedly Mr. Raulerson would have been entitled to a compensation provided by the general law, to-wit: \$7,500 per year, had the unconstitutional statutes not been passed. I am of the opinion that an unconstitutional statute cannot be the basis for any such claim. See 12 Corpus Juris, page 801, Section 230.

COUNTY OFFICERS — Clerks of Circuit Court

In the case of State ex rel. Baker v. Gray, 182 So. 620, the fourth head-note reads as follows:

"That county fee officers had compensated themselves and accounted for a given year under statute subsequently found to be invalid did not estop officers, who collected during following year fees earned during year accounted for, from applying amount so collected to payment of balance due on compensation to which they were lawfully entitled for year accounted for, where money involved had not been paid into county, but had been retained by officers. Acts 1931, c. 14666; Acts 1935, c. 16929; Acts 1929, Ex. Sess., c. 14502, Comp. Gen. Laws 1927, 2867, 2868."

The sum of \$425.22 for the year 1934, \$432.20 for the year 1935 and \$50.76 for the year 1936 are sums which Mr. Raulerson did not pay over to the County but retained in his own possession and I am of the opinion that he is entitled to apply these amounts on the deficiencies in compensation received by him in each of the years in question.

This opinion is not to be construed to be in conflict with my opinion to you dated September 3, 1938, regarding compensation of the Tax Assessor of Polk County.

We are returning the papers you enclosed.

January 25, 1939—O-28.

**FEE FOR MAKING MARGINAL ENTRY UNDER SECTION 5746,
COMPILED GENERAL LAWS**

Dear Sir:

You request my opinion as to what fee should be charged by Clerk of the Circuit Courts in connection with marginal satisfactions under Section 5746, Compiled General Laws of Florida 1927.

It is my opinion that a fee of \$.25 is authorized under Section 4867, Compiled General Laws of Florida 1927. That provision in Section 4867 which makes the fee for writing any paper other than therein specifically mentioned the same as copying any record or paper would seem to apply.

I find upon investigation that this is the fee which has been charged by the Clerk of the Circuit Court of Leon County for the past thirty years. I am also advised that it has been the long established administrative practice of Clerks generally to charge this fee.

May 23, 1939—O-297.

**AUTHORITY TO SIGN WARRANTS FOR ITEMS IN EXCESS OF
AMOUNT PROVIDED IN BUDGET**

Dear Sir:

I am in receipt of your letter of the 22nd, enclosing copy of letter from Mr. W. R. Lott, Clerk Circuit Court, and requesting my opinion as to

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whether Mr. Lott as Clerk Circuit Court of St. Lucie County has authority to sign warrants in payment of salaries of the county commissioners in an amount greater than that fixed in the 1936 budget.

In reply thereto I would state that Chapter 16286, Laws of Florida, 1935, provides as follows:

"The adoption of said estimates by the said board shall give said estimates the force and effect of fixed appropriations, and the same shall not be altered or amended or exceeded, nor shall the expenses estimated under one head be paid out of the estimate for any other expense; providing, however, that any item of expenditure set forth in an estimate of expenditures may be transferred to another item of expenditure upon resolution duly adopted by the Board of County Commissioners when approved by the Comptroller of the State of Florida, except items of expenditure for debt service."

In construing this provision in a case arising from St. Lucie County, the Supreme Court in the case of *Adams v. Lott*, reported in 150 So. 596, said:

"The county budget law under which the appropriation of \$700 for general overhead expense was made, authorizes the county commissioners to include in their budgets *expenditures contemplated* for the next fiscal year, for county purpose. These authorized appropriations for *contemplated expenditures* embrace estimates of necessary and ordinary expenses and estimates for special and extraordinary expenses. The *adoption* of such estimates gives the same 'the force and effect of fixed appropriations.' See Section 2306, Comp. Gen. Laws, Section 1528, Rev. Gen. St. Consequently, when the county commissioners of St. Lucie county adopted their budget containing the item, 'General overhead expense, \$700.00,' that item, *under express authority of law*, became from that time forward a 'fixed' appropriation of that sum of money for 'general overhead expenses' of the board of county commissioners in executing any lawful county purpose or function. It may be likened in this respect to legislative appropriations made by the Legislature for general legislative expenses. And such county appropriations, when made by county commissioners under direct authority of a statute authorizing them, are as valid for county purposes as similar appropriations when made by the Legislature are valid for state purposes."

It appears to me that since the county commissioners for the fiscal year 1936-37 only appropriated \$300 for the purpose of paying for road and bridge inspection, the Clerk of the Circuit Court would not be justified in signing a warrant for any amount exceeding the sum of \$300 as provided in the budget.

COUNTY OFFICERS — Clerks of Circuit Court

June 15, 1939.—O-378.

DUTIES RELATIVE TAX CERTIFICATES ON LANDS FORFEITED
UNDER CHAPTER 18296, ACTS 1937*Dear Sir:*

I am in receipt of your letter of the 9th, in which you inquire as follows:

"As Section 9 of Chapter 18296 has now become effective, will you please advise me what duties rest upon the clerks of the court of the various counties of the State who are the custodians of all tax certificates belonging to the State, in connection with those certificates which were four years old on the date Chapter 18296 expired."

It is my opinion that all lands in this State which had tax certificates against the four years or more old on June 16, 1939, passed to the State of Florida under and by virtue of the provisions of Section 9 of Chapter 18296, Laws of Florida, 1937, and therefore that the clerks of the circuit courts, who are the custodians of tax certificates against the lands which passed to the State, should hold these tax certificates subject to the further instructions of the Trustees of the Internal Improvement Fund, and in no event should the clerks sell or allow these certificates to be redeemed.

June 21, 1939—O-445.

ENTITLED TO FEES FOR CANCELLING EACH CERTIFICATE

Dear Sir:

I am in receipt of your letter of the 20th, in which you state as follows:

"Under date of September 2, 1938, you advised that the proper fee to be charged by clerks of the circuit court for cancelling municipal tax certificates is 25c.

"If a number of certificates are to be cancelled at one time and for the same interests, may the clerk apply the rate of 25c for the first one hundred words and 12½c for each additional one hundred words to the total number of words necessary to cancel the certificates?"

The portion of Section 4867, Compiled General Laws, 1927, referred to in the opinion of September 2, 1938, provides as follows:

"Recording any paper, first one hundred words or less\$.25

Each additional one hundred words or fraction thereof12½"

In my opinion this means that the clerk of the circuit court is entitled to a fee of 25c for the recording or notation of cancellation of each individual tax certificate, if he has to make a separate notation as to each certificate. If he could cancel numerous certificates with one notation, then he

COUNTY OFFICERS — Clerks of Circuit Court

would not be entitled to more than 25c for the first 100 words or less, and 12½c for each additional 100 words or fraction thereof, which were necessary to be used in the cancellation of the certificates.

November 8, 1939—O-647.

**JUDGMENT LIEN BOOKS—CONSTRUCTION OF CHAPTER 19270,
ACTS OF 1939**

Dear Sir:

This will acknowledge receipt of your letter of November 4th stating in part:

"In view of the conflicting opinions as between the various clerks of the court in the several counties of the State on the question of whether or not the above-captioned Act requires the clerks to provide additional books for the recording of judgment liens, I will appreciate it very much if you will look into this matter and give me your opinion. * * * "

In reply I wish to advise that I have examined Senate Bill No. 381 which became Chapter 19270, Acts of 1939. Section 1 provides:

"That the Clerk of the Circuit Court in each County in this State shall keep a judgment lien record in which he shall record certified transcripts of judgments and decrees of Circuit Court and all other courts of this State, and judgments and decrees of the United States District Courts held in the State of Florida, which may be presented to him for such record, and shall note at the bottom of such record the date, hour and minute of recording same."

To me the language is clear and I am of the opinion that the only judgment lien record book that a clerk must keep is the one now provided by said Section, and that all judgments must be recorded therein regardless of the fact that some of them may be judgments rendered by the Court of which he is clerk. I can see no necessity for the clerk continuing his foreign judgment book.

In construing Acts of the Legislature, I try to arrive at their intention. An examination of Section 2 indicates that the Legislature had in mind one record book where any person interested could find in one place in the county all judgments that are a lien upon property in that county. Otherwise, there would have been no reason for Section 2 of the Act which in effect provides that a judgment is not a lien until it has been recorded in this judgment lien record.

COUNTY OFFICERS — Clerks of Circuit Court

November 15, 1939—O-646.

DUTIES IN REDEMPTION OF TAX CERTIFICATES PURCHASED
BY PERSONS OTHER THAN OWNER OF LAND
ON WHICH CERTIFICATE ISSUED*Dear Sir:*

In response to your inquiry as to what are the duties of the Clerks of the Circuit Court when the owner of the land makes application for the redemption tax certificate purchased by persons other than the owner, I would state that most of these duties were described and defined by the Supreme Court of Florida in the case of *Ray E. Green, as Clerk v. State ex rel. Northern Investment Corporation*, recently decided.

It appears from this decision that a tax certificate sold under the Murphy Law may be redeemed by any person entitled to redeem, at any time before the tax deed is actually issued.

The amount required to be paid for redemption before the sale under the Murphy Law is two years old is:

1. The amount paid for the tax certificate purchased at the sale under the Murphy Law.
2. Interest thereon at three per cent per annum from the date of the sale under the Murphy Law to the time of redemption.
3. All Clerk's cost and expenses incurred in purchasing the tax certificate.

The amount required to be paid for the redemption after the sale under the Murphy Law is more than two years old is as follows:

1. The amount paid for the tax certificate purchased at the sale under the Murphy Law.
2. Interest thereon at three per cent per annum from the date of the tax certificate to two years after the sale under the Murphy Law.
3. The face of the oldest of the tax certificates purchased.
4. Interest thereon at eighteen per cent per annum for the first year from the end of the two year period after the purchase under the Murphy Law, ten per cent per annum for the second year and eight per cent per annum thereafter but not less than five per cent of the face of the tax certificate.
5. All Clerk's cost and expenses incurred in obtaining the tax certificate.

The clerks will be justified in allowing a tax deed to be issued on certificates purchased under the Murphy Law if the application therefor contains a statement, or if an adavit is made, to the effect that the lands described in the tax certificates do not constitute a homestead, when this statement is not duly challenged, provided it is otherwise lawful to issue the tax deed.

COUNTY OFFICERS — Clerks of Circuit Court

June 13, 1940—O-824.

**COMPENSATION—EXCESS FEES MUST BE PAID TO STATE OR
COUNTY AT END OF EACH YEAR***Dear Sir:*

This will acknowledge receipt of your letter of June 11th in which you state that you owe Charlotte County the sum of \$592.59 excess fees for the year 1939 and that this is the only year in which you have earned any excess income. You state further that:

"I do not feel that the County or State, should collect in a fat year so to speak, without considering the lean years."

You submit the following question:

"May I not have the privilege of totaling the net for the years of 1937, 1938 and 1939, and paying accordingly, which appears entirely equitable. May I suggest that quite a few Clerks paid their qualifying fees in the late Primary Elections on this same basis."

In reply I wish to advise that I know of no statute that would permit you to take the years of 1937, 1938 and 1939 as a basis for computing your income. This is a matter that is entirely controlled by statute and I have no discretion whatsoever. The law is very plain that you are entitled to a certain amount of money each year provided fees total a certain amount. The period for the accounting is based upon each year and as I have said before, I do not know of any law that would permit any other basis for computing the amount you are entitled to each year.

June 28, 1940—O-858.

**FEES UNDER MURPHY ACT, CHAPTER 18296, NOT INCOME OF
OFFICE UNDER SECTION 2866, C. G. L., 1927***Dear Sir:*

I have your letter of the 24th instant, the body of which reads as follows:

"I understand that the Trustees of the Internal Improvement Fund have designated the several clerks of the circuit court as agents to handle the sales of land which passed to the Board under Chapter 18296, Acts 1937.

"Will you please advise whether or not the fees received by the clerks for services in this connection are income of their office under the provisions of Section 2866, Compiled General Laws, 1927?"

Section 2866, Compiled General Laws of Florida, 1927, reads as follows:

"The term 'net income' as provided by this law shall mean the residue of the income from such office after deducting all reasonable expenditure for the salaries of clerks and assistants and the necessary expenditures for the proper operation of said office."

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Section 2865 provides that each County Official, whose compensation for his official duties is paid wholly or in part by fees or commissions, or fees and commissions, shall receive as his yearly compensation for his official services from the whole or a part of the fees, or commissions so collected, all of the net income from such office not to exceed \$5,000.00, together with certain percentages of additional designated receipts. It is to be noted that this Section relates to compensation for official duties or official services.

The compensation of the Clerk of the Circuit Court, in connection with Chapter 18,296, Acts of 1937, known as the Murphy Act, is not received by him for official duties or official services, as Clerk of the Circuit Court, but is received by him for non-official services rendered to the Trustees of the Internal Improvement Fund as their appointed agent.

In view of the above, it is my opinion that the fees of the Clerk of the Circuit Court, as agent of the Trustees of the Internal Improvement Fund of the State of Florida, for services rendered to said Trustees in connection with the said Murphy Act, Chapter 18,296 of 1937, do not constitute any part of the "net income" of the Clerk of the Circuit Court mentioned in said Sections 2865 and 2866, Compiled General Laws of Florida, 1927.

December 16, 1940—O-1012.

NOT AUTHORIZED TO ASSIGN CERTAIN TAX SALE CERTIFICATES UNDER THE MURPHY LAW

Dear Sir:

I am in receipt of your letter of the fifteenth together with enclosures from the City Attorney of Tampa, and the Clerk of the Circuit Court of Hillsborough County, regarding certain tax sale certificates and you asked my opinion as to whether or not the Clerk of the Circuit Court has the right to assign the certificates in question under the terms of the so-called Murphy Act.

It appears from the correspondence that the City of Tampa, in order to protect its city tax liens on its lands which might vest in the State of Florida under the so-called Murphy Law, made application to the Clerk of the Circuit Court to purchase the State and County tax certificates on several thousand parcels of real estate; that on April 14, 1939, a written application was made to the Clerk of the Court to purchase the tax sale certificates on the following described land:

"Lot 13 and Water lot 13 in Block "K"; Lot 12 and Water Lot 12, in Block "N"; and Lot 15 and Water Lot 15 in Block "N"; and Lot 17 and Water Lot 17 in Block "N"; all according to the map of plat of Ridgewood Park, as the same is recorded in Plat Book 10, Page 6, of the Public Records of Hillsborough County, Florida."

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It further appears that although the Clerk was requested to advertise and sell the lots, and the corresponding water lots, that there was advertised and sold only the water lots above described. This mistake on the part of the Clerk could have been discovered by the City in the exercise of reasonable diligence, by examining the advertisement, which would have shown that all the property requested to be advertised had not been included in the notice. The object of the notice was to invite competitive bidding, and that opportunity was not presented as to the property omitted from the notice.

I am therefore of the opinion that the Clerk is without authority to deliver the certificates outstanding against the lots not included within the advertisement of sale.

SECTION 3

County Officers — County Attorneys

May 31, 1940—O-816.

GOVERNOR AUTHORIZED TO APPOINT

Dear Sir:

At your request for an opinion as to your authority to make an appointment to fill the office of County Attorney in and for Alachua County, Florida, created by Chapter 19268, Laws of Florida, Acts of 1939, I beg to advise as follows:

Section 27 of Article III of the Constitution of Florida provides:

"The Legislature shall provide for the election by the people or appointment by the Governor of all State and county officers not otherwise provided for by this Constitution, and fix by law their duties and compensation."

The office of County Attorney created by Chapter 19268 is not an office provided for by the Constitution. By Section 7 of Chapter 19268, it is provided that said Act should not become effective until the same shall have been referred to the voters of Alachua County for adoption or rejection by a majority of the qualified electors voting upon the question of adoption or rejection. It is further provided in said Section that should the result of said election be in favor of the adoption of the Act, the Board of County Commissioners of said County shall thereupon appoint a County Attorney under the terms and provisions of the Act, who shall hold office until the General Election to be held in the year 1940.

Section 6 of the Act provides that if any section, paragraph, sentence, clause, phrase, or other provision thereof, shall be held unconstitutional or invalid, it shall not affect or invalidate any other provision thereof.

The provision of Section 7 for the appointment of a County Attorney by the Board of County Commissioners of said County is in conflict with Section 27 of Article III of the Constitution, and may be ignored.

Section 461 of the Compiled General Laws of Florida, which was originally enacted as Section 1 of Chapter 1633, Acts of 1868, provides in part as follows:

"Every office shall be deemed vacant in the following cases:

"Sixth. When any office created or continued by the Constitution or laws shall not have been filled by election or appointment under the Constitution or laws creating or continuing such office."

Section 464 of the Compiled General Laws of Florida, 1927, which was originally enacted as Section 2 of Chapter 1633, Acts of 1868, provides:

"Filling Vacancies. In all such cases, and in all other cases in which a vacancy may occur, if the office be a State, district or county office (other

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than a member or officer of the Legislature), it shall be the duty of the Governor to fill such office by appointment, and the person so appointed shall be entitled to take and hold such office until the same shall be filled by an election as provided by law, * * *

It is therefore my opinion that you have the authority under Section 464 of the Compiled General Laws of Florida, 1927, to fill by appointment the office of County Attorney for Alachua County, created by Chapter 19268, Acts of 1939, if in fact the said Act has been ratified and adopted by a majority of the qualified electors voting at an election as required by Section 7 of said Act.

SECTION 4

County Officers — County Commissioners

January 21, 1939—O-16.

BOARD NOT AUTHORIZED TO PAY EXPENSE OF OPERATING
FERRY OUTSIDE COUNTY*Dear Sir:*

You request my opinion as to whether or not a Board of County Commissioners would be authorized to pay a part of the salary of the ferryman or other expense of operating a ferry outside the limits of a county in view of the fact that the ferry is used by residents of the county. I have been advised that the particular ferry in question is wholly operated beyond the limits of the particular county involved.

It is my opinion that such an expenditure would not be legal. I find no statutory provision which would authorize such an expenditure. County Commissioners can exercise only that authority which is prescribed by law and it must always be borne in mind that when there is doubt as to the existence of authority it should not be assumed. See *Hopkins v. Special Road & Bridge District No. 4 in Brevard County*, 74 So. 310, 73 Fla. 247.

January 25, 1940—O-703.

NONCLAIM ACT NOT AUTHORITY TO PAY CLAIMS NOT
PRESENTED WITHIN ONE YEAR*Dear Sir:*

I am in receipt of your letter of the twenty-second in which you inquire as follows:

"Does the limitation contained in Section 4665 forbid the county commissioners from paying claims not presented within one year which they feel are just and would like to pay?"

In answer to this question, would state that Section 4665, C. G. L. 1927, provides as follows:

"4655. Claims Against Counties. Every claim against any county shall be presented to the board of county commissioners within one year from the time said claim shall become due, and shall be barred if not so presented."

In the case of *Whitehurst, et al., v. Hernando County*, 107 Fla. 627, the Supreme Court of Florida in discussing this provision said:

"Without considering the question of a departure in the pleading, or whether the county may be sued for such a cause of action, as is stated in this case, Section 2941, Revised General Statutes 1920, contemplates that such a claim as is here asserted, if good against the county, 'shall be presented to the board of county commissioners within one year from the time said claim

COUNTY OFFICERS — County Commissioners

shall become due, and shall be barred if not so presented.' The declaration does not allege that the claim had been presented to the county commissioners. The statutory requirement is a prerequisite to the right of action against the county. Sec. 15 C. J. 646; 7 R. C.L. 958."

It is, therefore, my opinion that this statute forbids the County Commissioners from paying claims not presented within one year, which they feel are just and would like to pay.

January 31, 1939—O-44.

**BOARD NOT TO WAIVE RIGHTS TO LEGAL FEES, FROM
COLLECTION OF DELINQUENT TAXES**

Dear Sir:

I am in receipt of your letter of the 27th, enclosing resolution adopted by the Board of County Commissioners of DeSoto County, in which they attempt to permit the County Clerk, Tax Collector and Tax Assessor to allow redemption of certain delinquent lands under Chapter 18296, Laws of Florida, 1937, without the county officials charging the fees now required to be collected by law.

In answer to your inquiry in said letter as to whether or not this can be legally done, I would state that it cannot. The Constitution of the State of Florida provides as follows on this subject:

"The Legislature shall provide for the election by the people or appointment by the Governor of all state and county officers not otherwise provided for by the Constitution, and fix by law their duties and compensation." Article III, Sec. 27.

"The Legislature shall provide for the election by the qualified electors in each county of the following county officers: A clerk of the circuit court, a sheriff, constables, a county assessor of taxes, a tax collector, a superintendent of public instruction and a county surveyor. * * * Their powers, duties and compensation shall be prescribed by law." Article VIII, Section 6.

In the case of *State ex rel. Buford, Attorney General, v. Spencer, Sheriff*, 81 Fla. 211, 87 So. 634, the Supreme Court of this State held:

"Fees collected by officer represent the charge which the state makes for services rendered by it through its officers, and constitutes a fund subject to the control of the state and to be applied as the Legislature directs."

There is no law giving the County Commissioners authority to waive the county's rights in excess fees which may be collected by the various county officers nor is there any law which allows the County Commissioners of a county to permit county officers to change the fees fixed by the Legislature for the collection of delinquent taxes.

COUNTY OFFICERS — County Commissioners

It is, therefore, my opinion that the Board of County Commissioners of DeSoto County does not have the authority to waive the county's rights and allow the county officials to collect a lesser amount than that set by the statute.

July 18, 1939—O-479.

NOMINATION AND ELECTION IN CERTAIN COUNTIES

Dear Sir:

I am in receipt of your letter of July 13, in which you inquire as to whether or not the members of the Board of County Commissioners and members of the Board of Public Instruction in the counties of this State having a population of not less than 10,700 and not more than 11,000, according to the last official census, should be nominated or elected upon a vote of electors throughout the entire county. In reply thereto, I would state that Chapter 13602, Laws of Florida, 1929, which relates to the nomination of the above described officers, provides as follows:

"Section 1. That from and after the passage of this Act when candidates for the office of member of the Board of County Commissioners or candidates for the office of member of the County Board of Public Instruction in Counties of the State of Florida having a population of not less than Ten Thousand Seven Hundred (10,700) and not more than Eleven Thousand (11,000) according to the last official Census, are to be nominated in a Primary election, such candidates shall be nominated by the result of the vote of the electors throughout the entire County."

Section 252, Compiled General Laws of Florida, 1927, relating to the election of the nominated officers, provides in part as follows:

"A county board of public instruction, consisting of three members, one from each school district, to be elected from the several counties at large of this State, and a board of county commissioners of five members, one for each county commissioner's district, elected from the several counties at large of this State, shall be elected by the qualified electors thereof at every general election."

It is therefore my opinion that under the above mentioned laws the members of the Boards of County Commissioners and the Boards of Public Instruction should be nominated and elected by a vote of electors throughout the entire county.

October 25, 1939—O-617.

AUTHORITY TO SUSPEND FOR COMMISSION OF FELONY

Dear Sir:

In response to your request for my opinion as to whether or not the conviction and subsequent appeal to the Supreme Court of Florida would be

COUNTY OFFICERS — County Commissioners

grounds for the removal of a member of the Board of County Commissioners of Lafayette County, I would state that he was convicted of a felony committed during his present term as County Commissioner of Lafayette County, and that under Section 15 of Article 4 of the Constitution of Florida, you have authority to suspend this officer for commission of a felony.

The office is not deemed vacant until the conviction has been affirmed by the Supreme Court, and if the appeal has not been affirmed by the Supreme Court by the time the next Senate convenes, then the suspension will have to be submitted to them for their approval.

This opinion does not in any way contradict my opinion of September 20 regarding Superintendent of Public Instruction of Escambia County, because in that case, he was convicted of a felony which was committed during a previous term of office and the conviction was superseded by a decision of the Supreme Court.

July 6, 1940—O-860.

**BUDGET—SETTING UP NEW ITEM—MAKING APPROPRIATION
THEREFOR AND TRANSFERRING SAME TO
ANOTHER FUND**

Dear Sir:

This will acknowledge receipt of your letter of July 3rd.

You state that the Board of County Commissioners of Polk County seek to transfer an item of a fund to an item of another fund and also seek to make a new appropriation and set up a new item within a fund, thus changing the budget for this fiscal year; also, that Chapter 15737, Acts of 1931, is asserted as authority for this transfer. You further state that Chapter 16286, Acts of 1933, and Chapter 16886, Acts of 1935, would seem to prohibit this transfer. You ask me to give you my opinion as to whether or not you have legal authority to approve such a transfer and new appropriation as above set forth.

In reply I wish to advise that I have read that part of the resolution you set forth in your letter and I cannot quite understand the mechanics of the proposed transfer. Evidently, the County Commissioners have attempted to set up a new item within the general fund that they have designated as "Transfers to Other Funds," and they have then made an appropriation to this fund in the amount of \$4,000.00, and then seek to transfer \$4,000.00 from another item within the general fund designated as "County Aid," and, thereafter to transfer said sum of \$4,000.00 from said item designated as "Transfers to Other Funds" to the Hospital, Farm and Home Maintenance Fund.

Chapter 15737, Acts of 1931, claimed by the County Commissioners as authority for the proposed transfer provides:

"Section 1. The Board of County Commissioners of every County in the State of Florida, which now has or may hereafter have a population of

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more than Seventy Thousand and not more than One Hundred Thousand inhabitants according to the last preceding State or Federal Census is hereby authorized and empowered, upon the approval of the State Comptroller, to transfer surplus funds from one item of a fund to another item, or a new item of a different fund."

This particular Act seems to have been superseded by several other Acts that apparently apply generally with respect to county budgets, and the particular provision with reference to transfers appears to be now contained in Section 16, Chapter 16886, Acts of 1935. I quote the same:

"It shall be unlawful to transfer the money, or any part thereof, of one fund to another fund or to pay from one fund the expenditures legally payable from another fund; provided, however, that such transfers or payments may be made if requested by resolution adopted by the board or officer charged with the expenditure of such fund requesting authority therefor, which resolution must be expressly concurred in by resolution of the County Budget Commission recorded in its minutes and approved by the Comptroller of the State of Florida, in writing.

"Expenditures allowed under one head of any fund of the budget prepared by the County Budget Commission shall not exceed the amount allowed under such head nor be paid out of the amount allowed under any other head of the same fund, as fixed, determine and appropriate by the County Budget Commission and stated in the budget certified by it, except by Resolution of the Board or officer charged with the expenditure of such fund requesting authority therefor, which must be approved by the County Budget Commission in writing."

It would seem to me that the latter Act would be authority for the transfer of funds provided the statute was strictly followed. In other words, the money belonging to one fund or any part thereof can be transferred to another fund to make expenditures legally payable from such fund provided the County Commissioners adopt a resolution to that effect which you approve, and if the County Commissioners sought to do this, it would be legal for you to approve the same if you so desire.

I do not see the necessity for setting up a new item to be known as "Transfers to Other Funds" and then transferring money to that fund and thereafter transferring money out of said fund to another fund known as the Hospital, Farm and Home Maintenance Fund.

My suggestion would be that the County Commissioners draw a resolution in accordance with Section 16, Chapter 16886, *supra*, and then I do not think there would be any doubt as to your authority to approve such a transfer.

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July 5, 1940—O-859.

EFFECT OF OVERDRAWING BUDGET

Dear Sir:

This will acknowledge receipt of your letter of July 1st attaching a letter from Honorable Roy Caruthers, Clerk Circuit Court of Sumter County, Florida. Mr. Caruthers wishes to know what the result would be if the County Commissioners overdrew the budget. You request me to advise you in the premises.

Section 2307 of the Compiled General Laws of Florida, 1529 Revised General Statutes of 1920, provides:

"Estimate of expenses not to exceed ninety-five per cent of estimated revenues. In making the tax levy for the year, the board of county commissioners shall consider the estimates of expenses as adopted, and the estimates of the anticipated revenues available for the year as made under Section 2302, and the estimated revenue from taxes, and in no case shall the estimates of expenses as adopted exceed ninety-five per cent of the estimated revenues."

Section 2306, Compiled General Laws of Florida, Section 1528 Revised General Statutes of 1920, reads:

" * * The adoption of said estimates by the said board shall give said estimates the force and effect of fixed appropriations, and the same shall not be altered or amended or exceeded, nor shall the expense estimated under one head be paid out of the estimate for any other expense. * * *"*

Section 7465 of the Compiled General Laws, Section 5332 of the Revised General Statutes of 1920, provides:

*"Each member of the board of county commissioners voting to incur an indebtedness against the county in excess of the expenditure allowed by law, * * * shall be guilty of malfeasance in office and subject to suspension and removal from office as now provided by law, and shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail for not more than six months or both for each offense."*

Section 7466 of the Compiled General Laws, Section 5333 of the Revised General Statutes of 1920, reads:

*"Any clerk of the circuit court, acting as county auditor, who shall sign any warrant for the payment of any claim or bill or indebtedness against any county funds in excess of the expenditure allowed by law * * * shall be personally liable for such amount, and he shall be guilty of a misdemeanor and punished in the same manner and subject to the same penalties as members of said board of county commissioners."*

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It is obvious that the Statute is very clear as to the liability of any county officer who might violate the same.

The Supreme Court of Florida in the case of *Kirkland v. State*, 97 So. 510, sustained an indictment, the second count of which reads as follows:

"The second count charged that the offense was committed 'by then and there approving and certifying vouchers as county commissioner for the expenditure from the road and bridge fund of said county for lumber and material for the construction of bridges and culverts, and for feed, care, and maintenance of live stock used for the working and upkeep of the public roads of the county, and causing large sums of money raised therefor by taxation upon the estimates and appropriations of the board of county commissioners of said county duly made and published by said board for the year 1920, to be paid out in payment and settlement of said vouchers for lumber and feed of live stock aforesaid, in excess of 95 per cent of the estimated revenue of said county for said purposes, and in excess of the estimates and appropriations of said board of county commissioners for said purposes.'"

September 6, 1940—O-703-1

**NONCLAIM ACT NOT APPLICABLE TO BILLS FOR STATUTORY
COMPENSATION**

Dear Sir:

Your letter has been received, requesting my opinion whether a Board of County Commissioners may pay the bill of a county officer for his statutory compensation if not presented within one year of the time such compensation became due, in view of the provisions of Section 2941 R. G. S. (Section 4665 C. G. L.), and the opinion of this office, dated January 25, 1940.

In *State ex rel Perkins v. Lee* (Fla.) 194 So. 315, decided February 27, 1940, a state employee was held not barred by reason of Section 4663 (5) C. G. L. from bringing suit for unpaid additional back salary more than three years after he had retired, the Court stating that all of the statutes of limitation found under the Article entitled Provisions Applicable to Other than Real Actions, which included Section 4665 C. G. L., "are applicable only to those situations where it is necessary to institute an action to reduce the claim to judgment before it can be enforced. Such statutes of limitation do not cover a situation where salary is due a state officer or employee by virtue of a statute on the subject * * *."

It is my opinion that the reasoning in the above case is equally applicable to county officers and therefore my previous opinion, dated January 25, 1940, must be modified so as to exclude from the claims coming within the purview of Section 4665 C. G. L. any bill of a county officer covering his statutory compensation. However, I call your attention to the cases of *State ex rel Baker v. Gray*, 133 Fla. 23, 182 So. 620, and *State ex rel Hen-*

COUNTY OFFICERS — County Commissioners

derson v. Foley, 118 Fla. 885, 160 So. 522, which hold that a county officer who pays moneys to the excess fee fund under a mistake of law as to his statutory compensation has no right to recover any amount so paid.

October 24, 1940—O-969.

**NOT AUTHORIZED TO MAKE CONVEYANCE OF PROPERTY
HELD BY COUNTY**

Dear Sir:

In your letter of the 23rd instant you ask to be advised whether the Board of County Commissioners have authority to make conveyance of property held by their county.

Section 5 of Article VIII of the Constitution of Florida provides:

"The powers, duties and compensation of such county commissioners shall be prescribed by law: * * *."

The powers and duties of the county commissioners have been by the Legislature from time to time prescribed as required by the quoted provision of the Constitution, but since the adoption of the provision of the Constitution above quoted, they have not been given by law the power to sell and convey land belonging to the county.

In *Parker et al. v. Evening News Publishing Company*, 54 Fla. 544, 45 So. 309, it was held that the powers and duties of county commissioners are under the Constitution purely statutory.

Applying this rule to the question propounded by you, the conclusion reached is that the county commissioners do not have authority of law to sell and convey the county's land.

SECTION 5

County Officers — County Judges

February 27, 1939—O-80.

FEES ALLOWED FOR ISSUING MARRIAGE LICENSE

Dear Sir:

I acknowledge receipt of your letter of the 22nd instant, asking to be advised if county judges are justified in making any changes in connection with the issuance of marriage licenses other than the \$3.00 provided by Sections 5848 and 5851, Compiled General Laws, 1927.

It is my opinion that the 25c which the county judge is authorized under Section 3296 of the Compiled General Laws, 1927, to retain out of the additional fee of \$1 which he is required to collect under Section 5851, Compiled General Laws, in addition to the fee of \$2 he is authorized to collect under Section 5848, Compiled General Laws, constitutes all the fees or compensation he is entitled to in connection with the issuance of a marriage license; and that he has no authority of law to charge or collect any fee other than the \$2 under Section 5848 and the additional \$1 he is required to collect under Section 5851, Compiled General Laws, for the issuance of a marriage license.

April 28, 1939—O-164.

COMPUTING COSTS OF CONVICTION UNDER SECTIONS 3 AND 4
OF CHAPTER 17857*Dear Sir:*

I am in receipt of your letter of April 26, inquiring as follows:

"In computing the amount to be collected as costs, should the usual \$5.00 conviction fee be included or does Section 4 of Chapter 17857, Acts of 1937, eliminate this?

"Does Section 3 of that Act mean that the county judge should make all collections and that none should be made by the sheriff as provided in the general law, or does it mean merely that the judge must pay over such fees as he does collect?"

In answer to the first question, I would state that Chapter 17857, Laws of Florida, 1937, does not prohibit the collection of the \$5.00 conviction fee as now authorized by law. The effect of Chapter 17857 is only to limit the salary of the county solicitor and the attorney for the Board of County Commissioners and not to make any difference in the fees which they are to charge for the performance of their duties.

In answer to your second question, I would state that under Section 3 of the Act, which Act is as follows:

COUNTY OFFICERS — County Judges

"It shall be the duty of the County Judge of the County Judge's Court and/or the Clerk of the County Judge's Court in all counties having a population of not less than 16,820 and not more than 16,835, according to the State census of 1935, to pay over and into the fine and forfeiture fund of the said County all fees, commissions, fines and revenues derived and resulting from the conviction of any and all persons charged with an offense and coming within the jurisdiction of the said County Judge's Court," that the County Judge is only authorized to make the same collections which he has heretofore been making and that the Sheriff should continue to collect fees which he has heretofore collected. The section means that the Judge must pay over such fees as he does collect.

May 23, 1940—O-809.

**NOT NECESSARY TO MAINTAIN INDEX OF LICENSES ISSUED
UNDER FLORIDA DRIVERS' LICENSE LAW**

Dear Sir:

This is in reply to your letter of May 21, 1940, enclosing a letter addressed to you from Mr. H. O. Fogle of the Works Progress Administration of Florida. The letter from Mr. Fogle states that the Works Progress Administration has received a request for a WPA project from the County Judge of Volusia County for the indexing of all drivers' licenses issued in Volusia County. You request my opinion as to whether the law makes it mandatory of the various County Judges to maintain an index of such drivers' licenses.

It is my opinion that the records are to be kept by the State Department of Public Safety in Tallahassee. See Section 32 of Chapter 19551, Acts of 1939. The County Judge is simply the agent of the Department of Public Safety in issuing licenses and is not required to maintain an index of licenses issued by him. As indicated in my opinion to you of October 7, 1939, persons residing in the various counties are free to obtain drivers' licenses from any County Judge in the State. An index of licenses issued by a particular County Judge would not necessarily be a complete index of licenses issued to the inhabitants of the County.

May 29, 1939.—O-369.

AUTHORITY TO ISSUE MARRIAGE LICENSE TO A MINOR

Dear Sir:

I am in receipt of your letter of the 24th inst., requesting my opinion as to whether or not you would be justified in issuing a marriage license to a minor whose parents are divorced and who only has the consent of the parent to whose custody the minor was awarded by the Court granting the divorce, under the provisions of Section 5850, Compiled General Laws of Florida, 1927, which is as follows:

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"Provided, that if either of such parties shall be under the age of twenty-one years, such county judge shall not issue a license for the marriage of such party unless there shall be first presented and filed with him the written consent of the parents of such minors to such marriage."

In reply thereto I would state that it is my opinion that Section 5850, Compiled General Laws, should be construed so as to require only the consent of the parent having custody and control of the minor before a marriage license could be issued to such minor. In other words, suppose one of the parents were dead. Then surely the statute could not be construed to mean that the consent of both parents should be obtained before the issuance of a marriage license.

June 8, 1939—O-80.

FEES ALLOWED FOR ISSUING MARRIAGE LICENSE

Dear Sir:

On February 27, 1939, in response to your request for an opinion as to the legal fees charged in connection with the issuance of marriage licenses, I advised that county judges have no authority in law to charge or collect any fee other than the \$2 under Section 5848, and the additional \$1 he is required to collect under Section 5851, Compiled General Laws "for the issuance of a marriage license." I was there passing upon the specific question before me, that is, the fees to be charged in connection with the issuance of a marriage license.

The fee charged for taking an affidavit of the applicant for marriage license constituted no part of the issuance of a marriage license, but is a matter entirely separate and apart from the issuance of such marriage license as stated in the opinion of this office dated April 8, 1932, and appearing at page 951 of the Biennial Report for 1931-32 above referred to.

In other words, the applicant is not required to make the affidavit before the county judge, nor is the county judge required by law to either prepare or take such affidavit, but the requirement is that no county judge shall issue a license for the marriage of any persons "unless there shall be first presented and filed with him an affidavit in writing, signed by both parties to the marriage, made and subscribed before *some person* authorized by law to administer an oath, etc."

The affidavit may be made before any person authorized to administer an oath, such as a notary public, justice of the peace, or clerk of the court. Therefore, it is no part of the duty of the county judge to administer the oath or take the affidavit as required, but if the affidavit is made before him, he may charge such fee therefor as any other person authorized by law to administer an oath might charge, and that service and the charge therefor does not constitute any part of the statutory duty of issuing a marriage license.

There is, therefore, no inconsistency between the two opinions above referred to.

SECTION 6

County Officers—Justices of the Peace

February 22, 1939—O-67.

PAYMENT OF COSTS FOR ISSUANCE OF PEACE BONDS

Dear Sir:

I have your letter of the 21st, in which you state as follows:

"In cases of bonds to keep the peace as provided by Section 8291, Compiled General Laws of 1927, should the costs be paid by the County or should they be collected from the affiant under Section 8490, Compiled General Laws, 1927, unless insolvent?"

In response thereto I would state that Section 8490, Compiled General Laws, 1927, provides as follows:

"8490. (6176.) Prepayment may be required.—In all cases of justices of the peace and county judges in this State shall require payment in advance or security for costs of process service of the same and of examination, unless the party applying for a warrant shall make an affidavit of insolvency and of substantial injury, to person or property, by him suffered, in which case process shall issue without payment of costs."

This section of the statute requires prepayment or the giving of security for costs by a party applying for the issuance of a peace warrant, unless said applicant should make an affidavit of insolvency and of substantial injury to person or property threatened to be suffered by him; however, this does not mean that the applicant, if he is successful in having the party against whom he is complaining placed under a peace bond, should eventually pay the costs. If a person is placed under a peace bond then that person should pay the costs or if he is insolvent the county would have to pay them and the money which the applicant has put up for payment of the costs or as security should be returned to the applicant.

If the justice of the peace finds there is no good ground requiring the defendant to enter into a peace bond, so much of such sum as the applicant (prosecuting witness) has advanced as security for costs rendered necessary by his application shall be retained on account of costs by the justice of the peace.

April 6, 1939—O-152.

AUTHORITY OF THE GOVERNOR TO DESIGNATE IN ABSENCE
OF REGULAR JUSTICE*Dear Sir:*

In reply to your letter of the 5th, requesting my opinion as to whether or not you have authority to designate a person to take over the duties of a justice of the peace during a sixty-day absence of the duly commissioned

COUNTY OFFICERS — Justices of the Peace

officer, I would state that I do not find any law authorizing you to do so. Section 8292, Compiled General Laws, 1927, provides as follows:

"In case a justice of the peace be disqualified or unable for any cause to try any criminal case, the same may be tried before any other justice of the peace or before the county judge."

You can see under this section, if a justice of the peace is unable to try a criminal case, then it may be tried by any other justice of the peace or before the county judge.

April 8, 1939—O-154.

**FAMILIES OF MEN MURDERED HAVE NO ENFORCEABLE
LEGAL CLAIM AGAINST STATE**

Dear Sir:

This is in reply to your letter of April 6, 1939, in which you ask to be advised as to the legality of the claim attached thereto. The claim is for reimbursement of the families of three men murdered by a justice of the peace and a special constable, for which offenses these officers were convicted of murder and sentenced to life imprisonment.

Section 22 of Article III of the Florida Constitution provides that the Legislature may provide for bringing suit against the State, in cases where liability exists. In the absence of statute authorizing suit, a State's immunity from suit is absolute. The Florida Legislature has not passed an Act permitting suits against the State, in cases such as this, and hence I am of the opinion that no enforceable legal claim for this wrong may be exerted against the State of Florida. However, the Legislature is authorized to take appropriate action for the relief of the families of the murdered men, and I note that at yesterday's session of the Senate, Senator J. Locke Kelly introduced Senate Bills Nos. 85, 86 and 87, each providing for an appropriation of \$15,000.00 for the relief of the families of the murdered men. These Bills were referred to the Committee on Pensions and Claims.

May 1, 1939—O-767.

ENTITLED TO FEES IN ALL CASES

Dear Sir:

I am in receipt of your letter of the 26th, in which you inquire:

"Will you please advise whether the decision of the Supreme Court in State ex rel. Powell v. Leon County, 182 So. 639, provides that justices are entitled to fees in all cases bound over to the county judge's court or only in those cases in which the defendant is convicted?"

COUNTY OFFICERS — Justices of the Peace

In reply thereto, I would state that the Supreme Court of our State, in the case of *State ex rel. Powell v. Leon County*, 182 So. 639, held as follows:

"A justice of the peace is entitled to receive from county statutory fees for services rendered in issuing process for arrest of one charged with misdemeanor, conducting preliminary examination, and binding him over to county judge's court for trial, unless accused pays costs on conviction. *Comp. Gen. Laws 1927, Sec. 2833; Const. Art. V, Sec. 22.*

"The statutory provision that county shall not pay costs and fees of committing trial, when information is not filed or indictment found against person held to bail or committed to answer to criminal charge by committing magistrate, does not control right of justice of the peace to receive fees from county for services in issuing process for arrest of one charged with misdemeanor, conducting preliminary examination, and binding accused over to county judge's court for trial, as there is no authority for filing information or indictment in such court and conviction therein is tantamount to filing of information or indictment in county court, criminal court of record, or circuit court. *Comp. Gen. Laws 1927, Sec. 2833; Const. Art. V, Sec. 22.*"

It is therefore my opinion that the justices of the peace are entitled to fees in all cases bound over to the county judge's court, regardless of whether or not the defendants are convicted.

November 13, 1939—O-650.

PROCEDURE UPON DISQUALIFICATION

Dear Sir:

I see no reason why Chapter 16053 would not apply to a justice of the peace who is disqualified upon one of the grounds specified in Section 3 of that Act; however, said Section seems to be restricted to cases of relationship or interest or in which the judge is a material witness for one of the parties. The file which is returned herewith does not indicate whether the justice named is disqualified or alleged to be disqualified upon one of those grounds or for prejudice or for other reason.

Therefore, I direct your attention to Section 8292, C. G. L. 1927, which relates specially to justices of the peace and which is not superseded by the Act of 1933, unless by implication. Also I call your attention to Sections 4341-4344, C. G. L. 1927, relating to disqualification for prejudice of any judge, expressly including justices of the peace, and providing for removal of the case affected to another justice district in the county, excepting a district where one of the parties resides.

I am unable because of lack of the exact facts to give a definite opinion in the particular case; however, I trust that these references will enable proper procedure to be taken according to exact circumstances and grounds of the disqualification alleged, and I will be glad to consider the question further upon further facts if necessary.

COUNTY OFFICERS — Justices of the Peace

June 11, 1940—O-820.

CONFLICT BETWEEN SECTIONS 6144 AND 3383, REVISED
GENERAL STATUTES

Dear Sir:

This is in reply to your letter of June 3.

You call my attention to the provisions of Section 3383, Revised General Statutes (Sec. 5236, Compiled General Laws) requiring a justice of the peace, upon resignation or removal, or upon expiration of his term of office, to turn over to his successor all dockets, books, papers and effects in his possession pertaining to his office. You further call my attention to Section 6144, Revised General Statutes (Sec. 8449, Compiled General Laws) which requires that the criminal docket of the justice of the peace shall be kept subject to the inspection of certain named officers and deposited, at the end of the term of the office of the justice of the peace, in the office of the clerk of the circuit court of the county.

It would therefore appear that the statutory provisions above set forth may be conflicting, insofar as the criminal docket of the justice of the peace is concerned. Under Section 6144, he is required to deposit such docket, at the end of his term of office, in the office of the clerk of the circuit court, while under Section 3383, he is required to turn over to his successor all dockets, etc., whenever he shall resign or be removed from office or the term of his office shall expire.

Insofar as there may be a conflict between the provisions of law above set forth, it is my opinion that Section 3383 must be controlling. The provisions contained in Section 3383, requiring the justice of the peace to turn over all dockets, et cetera, to his successor, were originally enacted into law in Section 1 of Chapter 3927, Acts of 1889. The provisions appearing in Section 6144, on the other hand, were included in Section 28 of Chapter 2093, Acts of 1877, twelve years before said Chapter 3927 was enacted. The views herein expressed are supported by the decision of the Supreme Court of Florida, in the case of Hillsborough County Commissioners v. Jackson, 57 So. Rep. 423. The following is from the opinion of the Court, text page 424:

"Where there are two conflicting sections of a general compilation or code of statute laws, that section should prevail which is derived from a source that can be considered as the last expression of the lawmaking power in enacting separate statutes upon the same subject. See *Lamar v. Allen*, 108 Ga. 158, 33 S. E. 958; 26 m. & Eng. Ency. Law (2d Ed.) 736; *Lewis' South. Stat. Con.* (2d Ed.), Sec. 281. See also, *Hall v. State*, 39 Fla. 637; 23 South. 119; *State v. Mulhern*, 74 Ohio St. 363, 78 N. E. 507; 6 Am. & Eng. Ann. Cas. 856."

SECTION 7

County Officers — Miscellaneous

June 19, 1939—O-384.

SAME FEES ALLOWED WHEN SERVICES ARE IDENTICAL

Dear Sir:

This will acknowledge receipt of your letter of June 17 requesting my opinion upon four questions propounded in connection with Senate Bill No. 80, Chapter 19174, Acts of 1939.

Before answering your interrogatories, I think it would be well to set out the pertinent part of the Act which is Section 1:

"That from and after the passage of this Act and upon its becoming a law, the fees and charges for like or similar services required by law to be performed by County Judges and Clerks of the Circuit Courts shall in all cases be the same as the fees and charges now or hereafter allowed by law to the Clerks of the Circuit Courts of the State of Florida for such services."

Question No. 1 is:

"Does this Act apply to justices of the peace or to county judges only?"

In my opinion this Act would apply to justices of the peace wherever there is a statute that provides that justices of the peace fees should be the same as county judges but in that instance only.

Question No. 2 is:

"Does this Act allow a per diem in addition to the fees for individual services performed in connection with a preliminary hearing or trial?"

I do not believe it was the intention of the Legislature to create any new or additional fees for county judges but only to make "the fees and charges for like or similar services required by law to be performed by county judges and clerks of the circuit courts * * * the same as the fees and charges * * * allowed by law to clerks of the circuit courts * * *."

Therefore, if the county judge was not entitled to a per diem fee prior to the passage of this Act, he would not now be entitled to one.

Question No. 3 is:

"Will any probate fees fixed by Section 5200, Compiled General Laws, 1927, be affected by this Act, or will only those which are not covered by this section be affected?"

Probate fees will be affected by this Act wherever there is a difference between the fees now allowed by law to county judges and the fees allowed to clerks of the circuit courts, in which event the latter will prevail.

Question No. 4 is:

"Will this Act affect fees in civil cases now specifically fixed by law?"

This Act does affect fees in civil cases now specifically fixed by law to the

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extent that wherever there are fees and charges for like or similar services required by law to be performed by county judges and clerks of the circuit courts, the fees shall be the same as now allowed to the clerks of the circuit courts for such services.

In answering your questions, I have taken into consideration the intention of the Legislature as derived from this Act. You will note in the preamble that the thought behind this Act was to conform the fees of the county judges and clerks of the circuit courts wherein they perform identical services so that the charges by each would be the same and that there would not be different fees or charges allowed for the performance of the same services by different officers. The effect of it is to now give us one fee bill for both county judges and clerks of the circuit court and wherever the services to be performed are identical, the fees are, of course, the same.

August 23, 1939—O-557.

**FEE OFFICERS—TELEPHONE AND FURNITURE—NECESSARY
ITEMS OF EQUIPMENT TO BE PAID FOR BY COUNTY**

Dear Sir:

This is in reply to your letter of August 21, in which you request my opinion as to whether the county should pay for telephones in the offices of the various county fee officers, including the county jail. The question propounded by you is whether charges for such telephones are to be paid out of fees received by the various county officers as expenditures incurred in the operation of such officers, or whether such charges are to be paid by the county commissioners out of the general funds of the county.

Under the provisions of Chapter 11954, Laws of Florida, Acts of 1927, (Sections 2865 to 2869 C. G. L., inclusive), necessary expenditures for the proper operation of such offices shall be paid from the fees received by the respective officers. Under Section 4 of that Act, however, it would appear to have been the intent of the Legislature that expenditures for the purpose of equipping, maintaining and supplying such offices with "necessary books, furniture, fixtures," are not to be considered "necessary expenditures for the proper operation" of such offices, and are not to be paid out of the fees of said officers.

The following is Section 2 of Chapter 11954, Acts of 1927, as embodied in Section 2865, C. G. L.:

"2866. 'Net Income' defined.—The term 'net income' as provided by this law shall mean the residue of the income from such office after deducting all reasonable expenditure for the salaries of clerks and assistants and the necessary expenditures for the proper operation of said office. (Id., Sec. 2.)"

The following is Section 4 of said Chapter 11954, as embodied in Section 2868, C. G. L.:

COUNTY OFFICERS — Miscellaneous

"2868. Payment of excess sums collected to county; expenditure of excess.—It shall be the duty of each and every such officer to pay annually hereafter into a special fund all money in excess of the sum to which they are, under the provisions of this law entitled and as annual compensation herein allowed, the board of county commissioners shall create such fund and shall expend the proceeds thereof for the purpose of equipping, maintaining, and supplying said office, from which said money is derived, with the necessary books, furniture, fixtures and all other things now supplied or furnished by the board of county commissioners and paid for by them from the general revenue of the county; Provided, that should the funds so created exceed the amount necessary for the purposes provided in this section, then the board of county commissioners shall have the authority, with the approval of the State Comptroller, to transfer same to the general county funds including the general county school fund. (Id. Sec. 4.)"

It is my opinion that a telephone must be considered part of the necessary furniture and equipment of a public office. My view is amply supported by a case very much in point, the case of *Smalley v. Dent County*, decided by the Supreme Court of Missouri, and reported in 177 S. W. Reporter, page 620. In that case, the Supreme Court of Missouri considered substantially the same question involved in your inquiry. The Court said:

"Section 2681, Revised Statutes 1909, is mandatory in its terms, and requires each circuit clerk to provide suitable furniture for his office. This section contemplates that those conveniences which have grown to be a matter of public necessity, unless prohibited by said section, should be furnished and paid for by the county.

"Mr. Webster, in his *Unabridged International Dictionary*, thus defines 'furniture': 'Supplies; outfit; equipment.' In this age of progression the telephone is as necessary as any other furniture or implements which might be used in the clerk's office. The record discloses that the telephone was a public necessity, and that the community would have suffered great inconvenience, had they been deprived of the use of the telephone mentioned in the case at bar. This court, in no uncertain language, has designated the telephone as a necessity, in respect to these public offices.

"* * * We have reached the conclusion from the examination of the foregoing authorities, that the telephone was not only a public necessity in the circuit clerk's office in Dent County, but that the same should have been maintained by the county, at its expense, as a part of the furniture of said office." Text pages 622, 623.

It is my opinion, however, that this ruling should be limited to the regular monthly telephone charge and should not be extended to long distance tolls. This opinion is predicated upon the fact that the chief benefit derived by the public from the telephones in the respective public offices is that such offices can be reached by persons calling from outside. It is for this reason that

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telephones can logically be considered as necessary furniture and equipment of such public offices. This opinion is not to be construed, however, as meaning that long-distance tolls cannot be paid as necessary expenditures for the proper operation of the respective county offices out of fees received by said offices. Such long-distance tolls are not, however, to be paid out of the general funds of the county.

August 25, 1939—O-558.

FEE OFFICERS—PREMIUMS ON OFFICIAL BONDS AS NECESSARY EXPENDITURES OF OFFICES UNDER SECTION 2866, C. G. L. 1927

Dear Sir:

This is in reply to your letter of August 21, in which you state the following:

"Under date of July 16 1931, (Biennial Report 1931-32 page 515), former Attorney General Landis held that premiums on bonds of county officers should be borne by the person qualifying for the office. A great many of the county fee officers feel that they should be permitted to charge this premium as one of the necessary expenditures for the proper operation of their office, within the meaning of Section 2866, Compiled General Laws, 1927.

"Will you please advise if these bond premiums may be so treated?"

In a further opinion, under date of January 6, 1933, reported at page 216 of the Biennial Report of the Attorney General for the years 1933-34, the late Attorney General Landis reiterated his previous ruling to which you refer. In this latter opinion, the Attorney General stated:

"Section 2419, Compiled General Laws, expressly authorizes the payment of the premiums on bonds of county commissioners and members of the board of public instruction, by the county and the school board. I am unable, however, to find a statute authorizing the county to pay the premiums on bonds of other officers, and I am unable to find any authority which would permit a county officer to charge the premium on his bond against the expenses of his office."

I have fully reviewed the question propounded by you. The conclusion is inescapable that the opinions of the late Attorney General Landis above referred to are correct. I call your attention to the case of *Daniel, et al., v. Hutchinson*, decided by the Supreme Court of Georgia, and reported in 150 S. E. Rep., p. 681. The Supreme Court of Georgia said the following:

"The tax commissioner is to 'give' the bond; he is to furnish the bond; that is a prerequisite to his entering upon the discharge of the duties of the office. And we think that, inasmuch as he is to furnish this bond, he is also under the duty of doing that which would enable him to furnish it; that

COUNTY OFFICERS — Miscellaneous

is, he is to find a 'reliable bonding company,' who will sign as security, and he must pay it that which is necessary to secure its signature, to-wit, the premium exacted by the company." 66 A. L. R., text page 795.

This view is supported by an annotation in 66 A. L. R., page 795.

This rule, however, applies only to official bonds which county officers must file as a prerequisite to qualifying as such county officers. It could not apply to other official bonds that may be required by statute of county officers already qualified as such. Needless to say, it could not apply to the official bonds of county school officers and members of boards of county commissioners for there is specific statutory authorization for payment of premiums on their official bonds out of public funds.

February 14, 1940—O-732.

FEE OFFICERS—WHAT CONSTITUTES NECESSARY
EXPENDITURES FOR PROPER OPERATION
OF OFFICE

Dear Sir:

You call my attention to Section 2866, Compiled General Laws of Florida, 1927 (Section 2 of Chapter 11954, Acts of 1927) which reads as follows:

"The term 'net income' as provided by this law shall mean the residue of the income from such office after deducting all reasonable expenditure for the salaries of clerks and assistants and the necessary expenditures for the proper operation of said office."

You request my opinion as to whether the "necessary expenditures for proper operation of said office," referred to in statutory provisions above set forth, includes substantial items of equipment or whether they refer only to current operating expenses. This question becomes particularly important in those counties where the fees received by county officers are sufficient in amount to pay the full amount of net income allowed by law as compensation to county officers. If county fee officers are not authorized to purchase substantial items of equipment as necessary expenditures for the proper operation of their offices, then in many instances there would be substantial amounts of money to be disposed of under the provisions of Section 2868, Compiled General Laws (Section 4 of Chapter 11954, Acts of 1927) which reads as follows:

"It shall be the duty of each and every such officer to pay annually hereafter into a special fund all money in excess of the sums to which they are, under the provisions of this law entitled and as annual compensation herein allowed, the board of county commissioners shall create such fund and shall expend the proceeds thereof for the purpose of *equipping, maintaining, and supplying said office*, from which said money is derived, with the necessary

COUNTY OFFICERS — Miscellaneous

books, furniture, fixtures and all other things now supplied or furnished by the board of county commissioners and paid for by them from the general revenue of the county; Provided, that should the funds so created exceed the amount necessary for the purposes provided in this section, then the board of county commissioners shall have the authority, with the approval of the State Comptroller, to transfer same to the general county funds including the general county school fund." (*Italics ours.*)

It is my opinion that county fee officers may not purchase substantial items of equipment as necessary expenditures for the proper operation of their offices, but that they may pay only the necessary current operating expenses. Substantial items of equipment should be purchased by the County Commissioners as provided in Section 2868, Compiled General Laws, 1927.

SECTION 8

County Officers — Prosecuting Attorneys

March 31, 1939—O-138.

FEES FOR CONVICTION ON MORE THAN ONE COUNT

Dear Sir:

In reply to your inquiry of March 27, 1939, I assume that you refer to the conviction fee of county prosecuting attorneys fixed by Section 8280, C. G. L., 1927.

Considering the question in your letter under that statute it is my opinion that a county prosecuting attorney is entitled only to a \$5.00 fee for conviction of the same person upon more than one count charging in substance the same offense, although it may be charged by the use of different language or by divers means in two or more counts.

Of course, he would be entitled to a fee of \$5.00 for each conviction if convictions are obtained for *different offenses* in more than one case, or upon different counts in the same case, although against the same person.

April 22, 1940—O-790.

INDIAN RIVER COUNTY—COMPENSATION FIXED BY CHAPTER 10072, AND NOT AFFECTED BY CHAPTER 19321

Dear Sir:

This will acknowledge receipt of your letter of April 20 enclosing a memorandum relating to the compensation of the County Prosecuting Attorney of Indian River County. You request me to advise you under what Act he should now be compensated.

The memorandum states that Chapter 19321, Acts of 1939, increases the compensation of county prosecuting attorneys. It states further that the Act creating the county court is Chapter 10072, Acts of 1925; that this Act provides for the setting up of the Court and under Section 4 provides for election and indicates that he would receive \$400.00 per year and \$5.00 per conviction, and further that it appears that the Prosecuting Attorney of Indian River County receives compensation as provided by law and as such would be entitled to receive from and after August 1, 1939, the effective date of Chapter 19321, Acts of 1939, the compensation therein provided.

In reply I wish to advise that Chapter 10072, Acts of 1925, above referred to, in Section 4 provides:

"The Prosecuting Attorney of said Court, prior to the general election in 1926, shall be appointed by the Governor and receive a salary of Four Hundred Dollars per annum, to be paid quarterly by Indian River County, Florida, upon warrant from the Board of County Commissioners of said County, and

COUNTY OFFICERS — Prosecuting Attorneys

a fee of Five Dollars for each conviction * * * and shall hold his office until his successor shall have been duly elected and qualified * * *."

It is apparent from this Section that his salary was fixed by this particular Act.

The general law is Section 5986, Revised General Statutes of 1920, now Section 8279, Compiled General Laws of 1927, and was passed in 1887, Chapter 3730. The reason that I refer to this is because Section 2 of Chapter 19321, Acts of 1939, to which my attention was directed in the memorandum, provides:

"Section 2. This Act shall take effect on August 1, 1939. This Act shall not apply to, change or affect the compensation of any County prosecuting attorneys now or hereafter receiving compensation or fees under any law of the State of Florida, other than under said Section 5987, but such other laws shall continue to fix the fees and compensation of such prosecuting attorneys notwithstanding this amendment of Section 5987."

It, therefore, appears that the Legislature in amending Section 5987, Revised General Statutes of 1920, limited the change so that the same did not affect the compensation of any county prosecuting attorney receiving the same under some other Act, and from Section 4 of Chapter 10072, Acts of 1925, it appears that the compensation of the county prosecuting attorney was fixed therein.

I therefore am of the opinion that the county prosecuting attorney is entitled to compensation under Chapter 10072, Acts of 1925, and not under Chapter 19321, Acts of 1939, because there is a specific limitation therein contained.

SECTION 9

County Officers—Sheriffs

May 13, 1939—O-265.

ARRESTS OF CONVICTS AFTER EXPIRATION OF REPRIEVES

Dear Sir:

Referring to the attached correspondence between you and Sheriff Hall of Clay County in regard to arrests of convicts after expiration of reprieves, it is my suggestion that the sheriffs take to any other counties where the convicts may be, a certified copy of the court's order of commitment, together with such process thereon as may be necessary according to the circumstances of the cases which vary to some extent. They may be advised by the State attorneys, county solicitors or other prosecuting officers.

The sheriff of the county where the fugitive is found should make the arrest in cooperation with the demanding officer. Either sheriff may arrest upon warrant, for an escape.

No doubt if the sheriffs and prosecuting officers are charged with keeping up with such cases, the situation indicated by your letter will be materially relieved.

December 5, 1939—O-664.

ENTITLED TO FEE FOR CALLING PETIT JURY

Dear Sir:

In your letter of October 2, 1939, you ask to be advised what service performed by the sheriff is covered by the provision in Section 4588, Compiled General Laws of Florida, 1927, as follows:

"Jury, petit, calling\$.20"

Many of the duties of the sheriffs are prescribed by statute. There is, however, no statute specifically requiring sheriffs to call a petit jury. By Section 4869, Compiled General Laws, "the Sheriff of the county shall be the executive officer of the Circuit Court of the county." By this provision it is the duty of the sheriff to execute lawful orders of the judge of the circuit court in addition to those duties specifically defined by law. The circuit judge may in his discretion order the sheriff to call the petit jury, and when this is done he would be entitled to the fee of 20 cents provided for in Section 4588, Compiled General Laws.

The practice seems generally to prevail of having the clerk call the jury, but there is no statute specifically making it the duty of the clerk. In fact, there is no statutory requirement that a jury be called, although it is a practice usually followed for the purpose of ascertaining if all members of the jury are present.

COUNTY OFFICERS — Sheriffs

April 5, 1940—O-778.

**SHERIFFS NOT ENTITLED TO MILEAGE INTO ANOTHER
COUNTY IN ABSENCE OF SPECIAL SHOWING
OF NECESSITY FOR TRIP**

Dear Sir:

I am in receipt of your letter of March 24, 1940, asking to be advised with reference to the following:

"I am in receipt of a letter from the Sheriff of Martin County, Florida, in which he asked to be advised with reference to the following:

"Upon receipt of a warrant for a party and the Sheriff is obliged to take this warrant to another county and the man is picked up by officers of the said county, the defendant puts up a bond which is acceptable to the Sheriff and he then takes the bond back with him, what mileage is the Sheriff entitled to in such cases?"

Section 4 of Chapter 19554, Acts of 1939, commonly known as the Florida Criminal Procedure Act, provides:

"The warrant shall be directed to all and singular the sheriffs and constables of the State of Florida. It shall be executed only by a sheriff or constable of the county in which the arrest is made, unless the arrest is made in hot pursuit, in which event it may be executed by any sheriff or constable who is advised of the existence of said warrant."

From the foregoing it appears that the sheriff of the county in which the crime was committed could not possibly have executed the warrant himself in the other county, since it appears that he was not in hot pursuit, and that the warrant was properly executed by the officer in the county in which the arrest was made.

Section 7 of the Florida Criminal Procedure Act provides that where an arrest by virtue of a warrant occurs in a county other than that in which the offense was committed and the warrant issued, if the offense be a bailable offense, the officer making the arrest shall take the person arrested before a magistrate of the county in which the arrest was made so that he can make bail returnable before the magistrate who issued the warrant.

Under the quoted sections it is obvious that the sheriff of the county in which the crime has been committed was not under any necessity or obligation to go into the other county with the warrant, since he could not execute the warrant and should have known that the accused could and might have put up bail for his appearance in the county in which the crime had been committed. The situation would have been different had the accused after his arrest failed or refused to make bail and the sheriff of the county in which the crime had been committed had then made the trip to return the accused for trial. There is no showing of any obligation upon the part of the sheriff to personally take the warrant to another county.

COUNTY OFFICERS — Sheriffs

Under the facts set out in the question as put to me, I do not believe the sheriff is entitled to any mileage.

I base this opinion upon the case of *State ex rel. Attorney General v. Johnson*, 35 Fla. 539, 17 So. 650, wherein the sheriff of the Supreme Court sought to collect mileage traveled to execute process of that court in Duval County. In that case the Supreme Court of Florida said:

"The Sheriff of Leon County is the sheriff of the Supreme Court, and he can in person serve any process of this Court. Still it cannot be doubted that a purpose of the statute in making the sheriffs of the State ex officio deputies to serve process of this Court was to save costs that would necessarily be greatly increased by the Sheriff of Leon County going into distant counties to serve process. It would be in violation of the spirit and purpose of the statute, we think, for the sheriff of the Supreme Court to travel several hundred miles to serve process of this Court, when there was no necessity for him to do so. If we were to concede that it was discretionary with him whether to serve process in person or by deputy, there is nothing to show in this case that he exercised such discretion in accordance with the spirit and purpose of the statute. He does not claim, in his answer to the motion, that the Sheriff of Duval County was disqualified in any way to serve the writs mentioned, or that there was any necessity for him to go in person to make the service. He claims that it is discretionary with him in any case whether he will serve process of this Court in person and charge mileage, or have it done by deputy. As before stated, a purpose of the statute in making the sheriffs of the State deputies to serve process of this Court was to save unnecessary costs, and on the question of the taxation of costs the Court must determine the correctness of any item charged. We cannot recognize the uncontrollable discretion of the sheriff to impose unnecessary costs of mileage or not, as he deems proper. In view of the statutory provision making the sheriffs of the State deputies for serving process of this Court, it is proper that the Court should say whether the cost of mileage has been necessarily or unnecessarily imposed by the service. As the matter stands here, there was no necessity for the sheriff of this Court to go to Duval County to serve the writs mentioned, and we think the costs of mileage were improper, and should not be allowed."

In the case about which you inquired the sheriff of the county in which the crime had been committed could not under the law have served the process in any other county, which to me makes the instant case a stronger one for disallowing mileage than the case cited.

April 12, 1940—O-782.

**CONSTRUCTION OF LAW—ARREST OF PERSON AS FUGITIVE
FROM JUSTICE FROM ANOTHER STATE**

Dear Sir:

Your letter of April 9 enclosing copy of letter from Sheriff John P. Steele of Okaloosa County has just reached me.

COUNTY OFFICERS — Sheriffs

I take it that you want an expression from this office as to the requirements of law which must be complied with before a sheriff of Florida can be expected to arrest a person in this State as a fugitive from justice from another State.

Section 8496, Compiled General Laws of 1927 provides in part:

"The Governor, when demand shall be made of him by the executive of another State or territory of any fugitive from justice, in the manner prescribed by the Act of Congress approved February 12th, 1793, and upon payment of the fee of Five Dollars hereinafter provided for, shall cause said fugitive to be arrested and secured either by making public proclamation or by issuing a warrant to that effect, as he may deem most expedient, under his hand and the seal of the State, directed to all and singular the sheriffs of this State, therein commanding them to arrest the fugitive therein named; and it shall be the duty of any sheriff upon receiving such order forthwith to execute the same."

Section 8498 of the Compiled General Laws of 1927 provides:

"Persons Charged with being Fugitive Held to Await Extradition or Warrant.—Upon an affidavit made before any judge or justice of the peace of this State that any person within the territorial jurisdiction of said judge or justice is a fugitive from justice from another State, specifying the State from which such person is a fugitive, and the crime with which he is charged, when and where committed, and that there is a warrant for his arrest issued by a competent court of the State from which he has fled, such judge or justice of the peace may issue a warrant for the arrest of the alleged fugitive, who, when arrested, shall be brought before the judge or justice issuing the warrant, or before some other judge or justice having jurisdiction in the premises, and examined; and if upon such examination there is found to be probable cause to justify the detention of the alleged fugitive, he may be committed by the judge or justice for a period of time, not to exceed ten days, to await the warrant for the extradition of the alleged fugitive; but if upon such examination there is not found probable cause to justify the commitment of the alleged fugitive as aforesaid, he shall be at once discharged from custody."

These two sections appear to be the only statutory basis for the arrest of a person as a fugitive from justice by a Florida sheriff. They provide two means by which such arrest can be properly made: The first being upon a warrant issued by the Governor of Florida after demand for the fugitive has been made upon the Governor of Florida by the executive of another State or territory; and second: Upon a warrant issued by any judge or justice of the peace of this State upon affidavit made before such judge or justice of the peace to the effect that such person, within the territorial jurisdiction of said judge or justice of the peace is a fugitive from justice from another State, specifying the State from which such person is a fugitive, and the crime with which he is charged, when and where committed, and that there is a warrant for his arrest by a competent court of the State from which he has fled.

COUNTY OFFICERS — Sheriffs

In my opinion, unless demand has been made upon the Governor of Florida for such a fugitive and the Governor's warrant issued thereon, or unless an affidavit as set out above be made before a judge or justice of the peace of this State and a warrant for such fugitive has been issued by such judge or justice upon such affidavit, a Florida sheriff cannot be required to arrest any person in the State of Florida as a fugitive from justice from another State. However, after either of the two foregoing methods to procure a warrant for the arrest of the fugitive has been followed and a warrant issued by the Governor or by a judge or justice of the peace, any Florida sheriff can be required to arrest the person designated in the warrant as a fugitive from justice from another State.

It is true that under the common law a law-enforcement officer could arrest without a warrant any person whom he had reasonable grounds to believe had committed a felony. Under that rule, which is in effect in this State, a sheriff may make an arrest of a fugitive whom he reasonably believes has committed a felony in another State, and hold the person so arrested a reasonable time while awaiting action under either of the statutory provisions quoted from.

March 29, 1939—O-137.

COUNTY LIABLE FOR GUARD AND SERVANT HIRE

Dear Sir:

To your letter of the 24th instant you attach a letter from the Honorable C. B. Hayes, Clerk of the Circuit Court for Union County, Florida, in which he asks your advice as to whether the Board of County Commissioners of Union County should pay for a guard and a servant kept by the sheriff at the jail of that county, and on which you request my opinion.

Section 4588 of the Compiled General Laws of Florida, 1927, fixing the compensation of sheriffs, contains two items of compensation, as follows:

"Guards, not more per day than \$2.00. Servants, not more per day than \$1.00."

In *Brown v. St. Lucie County*, 114 Fla. 789, 153 So. 906, our Supreme Court, construing these identical items with reference to the right of the sheriff of St. Lucie County to be paid for such services, held that when the sheriff of a county in the exercise of his honest judgment based upon a fair necessity therefor, employs guards or servants in connection with the county jail, which is county property and which the law requires him to manage and look out for, the county shall thereupon become liable to him for reimbursement for guards and servant hire at the statutory rates. The question for consideration and determination in such cases is the fair necessity for such services.

COUNTY OFFICERS — Sheriffs

April 6, 1939—O-150.

COUNTY LIABLE ONLY FOR COSTS OF EXECUTING WARRANT
IN PRELIMINARY HEARING*Dear Sir:*

I am in receipt of your letter of the 6th, requesting my opinion as to whether or not, in view of Sections 2833 and 8488, Compiled General Laws, 1927, costs in preliminary hearings when no indictment is found or information filed, except the costs of executing the warrant, can be paid.

Section 2833 provides as follows:

"If defendant is not convicted, or dies.—If the defendant is not convicted, or the prosecution is abated by the death of the defendant, or if the costs are imposed on the defendant and execution against him is returned no property found, or if a nolle prosequere be entered, in each of these cases the fees of witnesses and officers arising from criminal causes shall be paid by the county in the manner specified in the next three sections: Provided, that when a committing magistrate holds to bail or commits a person to answer to a criminal charge and an information is not filed or an indictment found against such person, the costs and fees of such committing trial shall not be paid by the county, except the costs of executing the warrants."

Section 8488 provides as follows:

"County not to pay costs in cases where information is not filed or indictment found.—Whenever a committing magistrate holds to bail or commits any person to answer to a criminal charge in a county court, a criminal court of record, or a circuit court, and any information is not filed nor an indictment found against such person, the costs of such committing trial shall not be paid by the county, except the costs for executing the warrant."

You will see from these laws that when a preliminary hearing is held and the person charged in the warrant is not subsequently indicted or charged by an information, that the only costs that the county is liable for are the *costs of executing the warrant*. This portion of the statute is clear and nothing can be read into it except that only the costs of executing the warrant shall be paid. I am therefore of the opinion that the sheriff's costs, such as those for serving witness' subpoenas, cannot be paid by the county, and that the only costs that the county is liable for in such cases is the cost of executing the warrant.

COUNTY OFFICERS — Sheriffs

April 24, 1939—O-161.

CUSTODY AND RELEASE UPON COMMITMENTS FOR TRIAL IN
CRIMINAL COURT OF RECORD; FEES THEREFOR*Dear Sir:*

In considering your letter of April 20 and attached correspondence with Sheriff Frank Karel of Orange County, I understand that the questions stated ordinarily arise under orders by the county judge or a justice of the peace committing accused persons to jail pending action in the criminal court of record after preliminary hearing and failure to give bail when required, and upon subsequent filing of informations against such persons. In reference thereto it is my opinion in answer to the four questions raised, that:

1. A commitment by a county judge or a justice of the peace may be directed either to the sheriff or a constable.

2. The officer, whether sheriff or constable, having technical custody of a prisoner or custody in law, is entitled to such fee as is lawfully payable upon his release. Technical or lawful custody should be distinguished from physical custody and depends upon which officer holds and serves a commitment order or similar process. The sheriff as a jailor may have physical custody but the custody in law may be by a constable or other officer.

3. A sheriff is not entitled to a re-commitment fee unless he acts under an order directed to him or directed in such a manner that he may properly execute it and which order he does serve or execute.

4. Jurisdiction or custody of the prisoner passes to the sheriff from a constable having lawful custody if and when the prisoner is released by the constable and the sheriff takes technical or lawful custody of the prisoner ~~under an order or process~~ for him so to do. It does not necessarily pass at the time of commitment or finding of information, although it may be proper for the sheriff as executive officer of the trial court to produce in court for trial at the proper time upon informations, prisoners held in jail.

Upon the above answers reference is made to Sections 8339, 8435, forms in Section 8458 and 8452, Compiled General Laws, 1927. Compare Section 8319.

5. It is not necessary upon filing of information for the clerk to issue a *capias* if the defendant is in custody. Sections 8375, 8258, Compiled General Laws, 1927; *Ex parte Cribbs*, 109 Fla. 286, 146 So. 812.

SECTION 10

County Officers — Superintendent of Public Instruction

February 27, 1939—O-76.

SALARY UNDER CHAPTER 17731

Dear Sir:

In your letter of the 21st instant you refer to Chapter 16240, Laws of Florida, Acts of 1935, which fixed the salary of the County Superintendent of Public Instruction of Okaloosa County at \$100 per month; Also to Chapter 17731, Acts of 1937, which fixed his salary at \$2,400 per annum, effective July 1, 1937. You also refer to Chapter 17862, Acts of 1937, which fixes the salary of county superintendents of public instruction on the total annual receipts of the respective counties from sources for school purposes, including special tax school district taxes and moneys apportioned to the counties from the State Teachers' Salary Fund. You then ask whether the provision in Chapter 17862, limiting the maximum amount which any superintendent may be paid to not exceed the sum of \$600 in excess of the amount which he was being paid at the time of the passage of Chapter 17862, should be based on Chapter 16240, Acts of 1933, or Chapter 17731, Acts of 1937.

In my opinion the limiting provision of Chapter 17862 has no application to either Chapter 16240 or Chapter 17731. Both Chapters 16240, Acts of 1933, and 17731, Acts of 1937, are local Acts, whereas Chapter 17862 is a general Act, and under the rule of statutory construction Chapter 17731 is not repealed or in any sense modified or changed by any of the provisions in Chapter 17862.

In my opinion the salary of the county superintendent of public instruction of Okaloosa County is covered by and confined to Chapter 17731, Acts of 1937, and that he is not entitled to any additional or increased compensation or salary by reason of the provisions of Chapter 17862. The provision of Chapter 17862 could not operate to increase the salary of the County Superintendent of Public Instruction of Okaloosa County over that provided for in Chapter 17731, for the reason that at the time Chapter 17862 was passed, the said superintendent was receiving a salary of \$100 per month under the provisions of Chapter 16240, Acts of 1933, and did not receive compensation under Chapter 17731 until from and after July 1, 1937.

SECTION 11

County Officers — Supervisor of Registration

March 2, 1939—O-73.

DUTY RE: SPECIAL TAX SCHOOL DISTRICT ELECTIONS
UNDER SECTION 706, C. G. L.*Dear Sir:*

You request my opinion concerning the duties of supervisors of registration under Section 706, Compiled General Laws of Florida, 1927.

Section 706 reads as follows:

"All special tax school district elections shall be held and conducted in the manner prescribed by law for holding general elections, except as provided in this Article, and it is hereby made the duty of the supervisor of registration of any county to furnish upon payment for such service to the county board of public instruction, on demand, a certified list of the qualified voters residing in a special tax school district, or the territory to be created into a special tax school district, that have paid a tax on personal or real property for the year next preceding any such special tax election."

In preparing the certified list referred to in Section 706 the duties of the Supervisors in ascertaining whether persons, otherwise qualified, have paid a tax on personal or real property are fulfilled when the supervisors resort to official tax books for such information. In other words, the supervisors of registration are authorized to prepare their lists from such official tax records.

January 13, 1940—O-692.

WHEN TO RESIGN TO BECOME CANDIDATE FOR
ANOTHER OFFICE*Dear Sir:*

I have your letter of the 11th instant referring to that part of Section 258, Compiled General Laws of Florida, 1927, relating to the above captioned matter reading as follows:

"The Supervisor of registration shall not be eligible for any other office until six months after ceasing to be such Supervisor."

You make particular inquiry if resignation should be six months before the primary or six months before the general election, or six months before the time of taking office should he be elected.

The primary system is a necessary and integral part of the whole election system of this State, and the obvious purpose of all the provisions of the

COUNTY OFFICERS — Supervisor of Registration

election law, and such is the legislative intent, is that elections should be protected in accordance with the mandate of the Constitution to prescribe rules and regulations governing the conduct and holding of elections.

It appears that the evident purpose of the quoted provision of the statute was and is to prohibit a supervisor of registration from acting as such in connection with an election, either primary or general, in which he is a candidate for any other office.

Entertaining this view of the law, it is my opinion that a supervisor of registration desiring to become a candidate for some other office should resign at least six months prior to the date of the primary in which he may be a candidate for another office.

SECTION 12

County Officers — Tax Assessors

April 21, 1939—O-160.

PAYMENT OF 2 PER CENT COMMISSIONS AS PROVIDED UNDER
CHAPTER 17876, ACTS OF 1937*Dear Sir:*

In your letter of the 18th instant you asked to be advised whether the 2% commissions payable to assessors of taxes, as provided in Section 2 of Chapter 17876, Acts of 1937, apply in the case of certificates bought by special tax districts or taxing units other than the State.

Chapter 17876 is an Act fixing the compensation of assessors and collectors of taxes and the manner of payment of such commissions. In Section 2, it is provided that when any lot or parcel of land certified or sold to the State of Florida for the non-payment of taxes shall be redeemed or certificates purchased by payment to or through the clerk of the circuit court, the clerk shall, before making final remittance of the balance on hand derived through such redemption or purchase, pay to the tax assessor two per cent of the amount of the principal of the taxes for the years 1937 and subsequent which are covered by said certificate or certificates or subsequent or omitted taxes redeemed or purchased, excepting any fees or commission that may have been allowed or paid for the first year's taxes included in said certificate, the amount to be deducted by the clerk from his remittance made to the various districts participating in the certificate.

In Section 1 of the Act, it is provided:

"All commissions for assessing and for collecting special tax district taxes shall be paid at the time and in the manner now or as may hereafter be provided for the payment of the commissions for the assessment and for the collection of county taxes."

I construe this quoted provision of Section 1 to require that when tax sales certificates issued to special taxing districts for the non-payment of special tax district taxes are redeemed or purchased by payment to or through the clerk of the circuit court, the clerk shall, before making final remittance of the balance on hand derived through such redemption or purchase, pay to the tax assessor of the county in which the land redeemed or purchased lies, two per cent of the amount of the principal of the taxes for the year 1937 and subsequent years which are covered by said certificate or certificates or subsequent or omitted taxes redeemed or purchased, excepting any fees or commissions that may have been allowed and paid for the first year's taxes included in said certificates, the amount to be deducted by the clerk from his remittance made to such special tax districts participating in such certificate or certificates.

COUNTY OFFICERS — Tax Collectors

January 25, 1940—O-703.

**DETERMINATION OF SALARY UNDER CHAPTER 17880,
ACTS OF 1937***Dear Sir:*

I am in receipt of your letter of the twenty-second in which you inquire as follows:

"Should the provisions of Chapter 17880, Acts of 1937, be applied on an annual basis or should they be accumulative during the whole life of the Act; i. e., if the officers receive more than the amount specified in this Act in any one year, should that excess be carried over into the next year to offset a deficit in that year?"

In answer to this question, would state that Chapter 17880, Laws of Florida, 1937, in my opinion does not limit the salary of the tax assessors and tax collectors in this particular county to the sum of Twenty-Four Hundred Dollars per annum, but guarantees that this amount of salary will be forthcoming to these officers. Sections 4 and 5 of the Act provide as follows:

"Section 4. In the event the compensation from fees and commissions of said Tax Collector and Tax Assessor, respectively, exceed the total sum of monthly compensation and necessary expenses mentioned in this Act, then and in that case such excess fees and commissions so received shall be credited by such Tax Collector and Tax Assessor to future monthly accounts where a shortage may be found to exist in meeting the requirements herein.

"Section 5. The provisions of this Act shall be considered cumulative and not to repeal any existing laws on the subject but are hereby declared to be intended to provide an adequate salary to be paid said Tax Collectors and Tax Assessors falling within the population mentioned in this Act whose compensation from fees and commissions fall short of the stated salaries and expenses in this Act set forth."

It is my opinion that these provisions mean that the tax collector and tax assessor shall make their reports required by the Act monthly, but if at the end of the fiscal year, it appears that they have earned more than Twenty-Four Hundred Dollars and expenses of the office, then they would be entitled to this excess provided it did not amount to a sum exceeding the amount fixed in the general law on this subject. This intention is clearly expressed in Section 5 of the Act. It is, therefore, my opinion that the Act should be applied on an annual basis rather than an accumulative basis over the period of the entire Act.

COUNTY OFFICERS — Tax Assessors

December 16, 1940—O-1013.

WHETHER ADDITIONAL COMPENSATION COLLECTED FOR
MAKING UP TAX LISTS WOULD BE CONSIDERED AS
INCOME OF OFFICE UNDER SECTION
2866, C. G. L. 1927

Dear Sir:

Upon the request of Honorable James Owen and Honorable Newt Lummus, Tax Assessors, respectively, of Palm Beach and Dade Counties, who are affected by my opinion in the above matter, of October 30, 1940, I have reviewed that opinion and re-examined the facts.

In your statement of facts recited in my opinion, I find that an error was made as to the decree, referred to therein, of the Supreme Court of Florida in the case of *State ex rel. Neafie v. Board of Commissioners of Everglades Drainage District, et al.*, a copy of which I enclose herewith, which provides in part as follows:

"NOW THEREFORE, we being willing that justice be done in the premises do hereby peremptorily command that you the Respondents Board of Commissioners of Everglades Drainage District and James H. Franklin, H. L. Lyons, D. R. McNeil, George A. Chalker, and James E. Beardsley, as and constituting the Board of Commissioners of Everglades Drainage District, do forthwith make up through your respective officers and employees, as required by law, for the respective tax assessors of the Counties of Monroe, Dade, Broward, Palm Beach, Martin, St. Lucie, Collier, Hendry, Glades, Highlands, and Okeechobee a list of the lands in Everglades Drainage District lying in each of said counties according to the zones provided in Chapter 10026, Laws of Florida, designating upon each of such lists the amount of taxes levied against each parcel of land in Everglades Drainage District in such counties, for the years 1933, 1934, 1935, 1937, 1938 and 1939 as provided by said Chapter 10026, Laws of Florida, excepting therefrom lands not subject to taxation by said Act, and after publication of notice as required by Section 1167 of the Revised General Statutes, forthwith do cause such lists to be signed and attested and forthwith forwarded to the tax assessors of the respective counties in which said lands lie; and that you, the said Respondents, J. Otto Kirchheimer, as Tax Assessor of Monroe County; J. N. Lummus, Jr., as Tax Assessor of Dade County; L. O. Hanson, as tax assessor of Broward County; James M. Owens, Jr., as Tax Assessor of Palm Beach County; A. C. Courson as Tax Assessor of Martin County; E. R. Pierce, as Tax Assessor of St. Lucie County; D. W. McLeod, as Tax Assessor of Collier County; Dennis Small, as tax assessor of Hendry County; I. E. Scott, as Tax Assessor of Glades County; P. G. Gearing, as Tax Assessor of Highlands County; and Robert LaMartin as Tax Assessor of Okeechobee County do receive the said lists for your respective counties and forthwith, after receipt thereof, do enter upon the tax rolls for the year 1940 of the counties of which you are

COUNTY OFFICERS — Tax Assessors

respectively tax assessors, the taxes or assessments shown by the lists so forwarded and by said Chapter 10026, Law of Florida, to be assessed for the years 1933, 1934, 1935, 1937, 1938 and 1939 in the manner provided by law, and that you do attach to your respective tax rolls for the year 1940 upon which such lists and taxes are commanded to be entered as aforesaid before delivery thereof to the tax collectors of your respective counties the special warrant required by Section 1168 of the Revised General Statutes."

Under Section 1537, C. G. L., which in part is as follows: "At the first meeting of the said board after the passage and approval of this law as amended in 1915, and thereafter on the second Tuesday in January of each year, the *said board shall prepare for each county in which said district may lie, in whole or in part, a list of the lands lying in such county and embraced in said drainage district.* Such lists shall describe such lands, when it is convenient to do so, by sections, townships and ranges, and upon such list or lists shall be designated the amount assessed by this Article upon each section of land or part thereof for the year in which such list or lists are made," it became the duty of the Board of Commissioners of the Everglades Drainage District to prepare the list of lands to be assessed for Everglades Drainage District taxes, as provided by the 1925 and prior Acts. Because of their familiarity with the assessment of taxes for State, county and other purposes, I am informed that the commissioners requested the assessors, not as assessors, but as individuals, to prepare the list of the land within the district and as their agents to make up the lists, which lists were adopted by the commissioners.

Neither the statute nor the decision of the court prohibited the employment by the commissioners of the district of clerical assistance to aid them in the work required of them by law.

Under the order of the court and the statute, 1538 C. G. L. 1927, which provides in part as follows: "It shall be the duty of the tax assessor of each of the several counties embraced in whole or in part within said district to receive such list, and he shall enter upon the tax roll of the county of which he is the tax assessor the tax or assessment shown by said list, to be assessed by this article for such year against the lands described in such list," the tax assessors were only required to receive such list and enter the taxes against the lands therein contained, as provided by the 1925 and prior Acts. It appears from the court's order that the tax assessors were required to extend the taxes on the lists for the years 1933, 1934, 1935, 1937, 1938, 1939 and 1940, as provided by Chapter 10026, Laws of Florida, 1925. I am informed that the tax assessors had extended the taxes on the lists for the years 1937, 1938 and 1939 upon the basis of the 1937 law, the tax rolls having to be changed to conform to the assessments in the 1925 Act, because the court held the 1937 Act unconstitutional. I am informed that the tax assessors made up the tax lists and made these extraordinary extensions of taxes by employing extra help and by working overtime.

COUNTY OFFICERS — Tax Assessors

Section 2866, C. G. L. is as follows:

"The term 'net income' as provided by this law shall mean the residue of the income from such office after deducting all reasonable expenditure for the salaries of clerks and assistants and the necessary expenditures for the proper operation of said office."

I construe the net income as defined in this statute to mean the residue of the income from the performance of official or statutory duties.

The work which the tax assessors have performed in making up the tax lists and re-extending the taxes against the property in the Everglades Drainage District were extraordinary duties outside of their statutory duties, which they performed respectively as agents of the Board of Commissioners of Everglades Drainage District and pursuant to the decree of the court, and I am of the opinion that the persons performing such extraordinary duties are entitled to reasonable compensation therefor, which should not be included within the income of the office of the tax assessor.

Because of the facts hereinbefore set out the opinion heretofore rendered by me and referred to herein, on October 30, 1940, is rescinded.

SECTION 13

County Officers — Tax Collectors

June 30, 1939—O-435.

COMPTROLLER TO USE DISCRETION AS TO TYPE OF
BOND REQUIRED*Dear Sir:*

I am in receipt of your letter of the 30th, in which you enclose a file containing much correspondence and a bond of W. R. Faircloth, Tax Collector of Holmes County, and asking me whether or not you have the right to disapprove this bond because it is a personal bond and require a bond of a surety company. It appears from the file that Mr. Faircloth was removed by the Governor for an alleged shortage and that only a small portion of the money which alleged to be short was recovered from his previous bond, which was a personal surety bond, and it also appears that the Governor has requested that Mr. Faircloth give a surety bond written by some surety company when he is re-instated. It further appears that some of the sureties on the tendered bond are the same as were on the previous bond.

Section 2417, Compiled General Laws of Florida, 1927, provides as follows:

"The tax collector of each county shall give bond in a sum to be fixed by the board of county commissioners of the respective county, subject to the approval of the Comptroller as to amount and surety. In fixing said bond the board of county commissioners shall take into consideration the amount of money likely to be in the custody of the collector at any one time."

Under this statute you have the right to exercise a sound discretion as to the type of bond you will approve, and it is my opinion that in view of the circumstances in this case, that you do have the right to require a surety bond written by a surety company and not accept the bond upon which the sureties are private individuals, if you think the interests of the State and county would be better protected.

September 3, 1940—O-914.

COMMISSIONS WHERE CERTIFICATES SOLD OR REDEEMED
AT LESS THAN FACE*Dear Sir:*

I have your letter asking whether a tax collector has a right to the full commission of five per cent upon the face amount of a tax certificate under the provisions of Chapter 15998, Acts of 1931, Laws of Florida, where the certificate is redeemed at less than the face amount under the provisions of Section 996, Compiled General Laws.

A previous opinion of this office, dated August 15, 1931 (Biennial Report 1931-32, page 703) construing Chapter 15978 (Senate Bill 14XX) held that the

COUNTY OFFICERS — Tax Collectors

tax collector is entitled to a commission only upon the amount for which the certificate is sold. Since that time our Supreme Court has construed this Act in connection with sales under the Murphy Act and has held that the tax collector under the provisions of C. 15978 has a vested right to the full commission of five per cent upon the face amount of the certificate regardless of the amount of the sale. *Rogers v. Bandy*, 132 Fla. 790, 182 So. 27.

The language used by the Court in this case as to the vested right of the tax collector to his full commission is so broad and definite, it is my opinion that it would control the question now presented by you and require that the tax collector be paid the full commission of five per cent upon the face amount of the tax certificate whether the certificate is sold under the provisions of the Murphy Act or redeemed under the provisions of Section 996, C. G. L. (Section 4, C. 1806, Acts of 1919) for less than its face amount.

October 30, 1940—O-974.

**AUTHORITY TO ACCEPT PAYMENT OF STATE AND COUNTY
TAXES WHEN TAXPAYER REFUSES TO PAY EVER-
GLADES DRAINAGE DISTRICT TAXES**

Dear Sir:

I am in receipt of your letter of the 28th inst., with certain enclosures, in which you call my attention to the opinion of my predecessor, dated January 1, 1932, in which he held unconstitutional that part of Chapter 14717, Acts of 1931, forbidding the tax collectors accepting State and county taxes when a taxpayer refuses to pay the taxes of the Everglades Drainage District. You further call my attention to Section 53 of Chapter 17902, Laws of Florida, 1937, which also forbids the tax collector accepting State and county taxes without the payment of Everglades Drainage District taxes. You ask my opinion as to whether or not the tax collectors in the counties comprising the Everglades Drainage District would have authority to accept State and county taxes without requiring payment of Everglades Drainage District taxes.

I have examined the opinion of my predecessor, dated January 1, 1932, the 1931 law and the 1937 law, above referred to, and it is my opinion that Section 53 of Chapter 17902, Acts of 1937, is unconstitutional for the same reason set forth in the opinion of my predecessor, dated January 1, 1932, on this same subject, and that the tax collectors of the various counties affected do have authority to accept State and county taxes without requiring the payment of Everglades Drainage District taxes for the years 1933, 1934, 1935, 1937, 1938, 1939 and 1940, which were spread upon the tax books during this present year.

To hold that the tax collector might refuse to accept the State and county tax levied pursuant to the Constitution and statutory authority, because of the fact that a taxpayer refused to pay a special drainage tax on the lands in-

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volved, would be contrary to the provisions of the Constitution providing for the assessment and collection of State and county taxes for the support of the State and county government, and might result in litigation which would defer the payment of State and county taxes to such extent as to impair the proper administration of the State and county government.

November 25, 1940—O-994.

TAX COLLECTOR, AS AGENT OF MOTOR VEHICLE COMMISSIONER CANNOT MAINTAIN A MOTOR VEHICLE LICENSE AGENCY IN ADJOINING COUNTY

Dear Sir:

This is in reply to your letter of November twenty-fifth. You request my opinion as to whether a tax collector of one county, acting under Section 1007, Revised General Statutes, as amended (Section 1281, Compiled General Laws, Permanent Supplement) is authorized to maintain an agency for selling motor vehicle licenses in an adjoining county.

It is my opinion that the tax collector can officially act only in the county for which he is commissioned. This will apply to the performance of his duties under the statute above referred to, as well as other duties as tax collector.

CHAPTER IV COURTS

SECTION 1

Circuit Judges

July 30, 1940—O-881.

EXECUTIVE ORDER INSUFFICIENT FOR ASSIGNMENT

Dear Sir:

This is in response to your request for my opinion as to the legal sufficiency of your executive order dated the 13th day of July, A. D. 1940, assigning the Honorable A. Z. Adkins, a Judge of the Eighth Judicial Circuit of Florida, to the Thirteenth Judicial Circuit of Florida.

I note that the order directs Judge Adkins " * * * to proceed to Tampa, in the County of Hillsborough, State of Florida, and thereupon on Monday, the 22nd day of July, A. D. 1940, and as long as may be necessary thereafter, to be and appear in the Circuit Court of the Thirteenth Judicial Circuit of Florida, in and for Hillsborough County, and to then and there assist the Circuit Judges of the Thirteenth Judicial Circuit of Florida: * * *."

In *McCall v. Adams*, 116 Fla. 558, 156 So. 524, the Supreme Court of Florida had under consideration the sufficiency of an executive order designating, assigning, and appointing the Honorable Hal W. Adams, Judge of the Third Judicial Circuit of Florida, "to proceed to Crestview, in the County of Okaloosa, State of Florida, and thereupon on Monday, the 27th day of August, A. D. 1934, and as long as may be necessary thereafter, proceed to conduct the trial of all causes as may properly come before him, in said Court; * * *."

In discussing the statute under which the said executive order was made and which is the basis of the order here under consideration and its purposes, the Court said:

"Assignments by executive order of circuit judges are to be liberally construed and all intendments will be indulged in to support their sufficiency to confer jurisdiction on the assigned judge to act, wherever there appears in the executive order any basis by which the scope and extent of the assigned judge's authority can be determined.

"But since the statute contemplates the executive orders shall be addressed to (1) ordering an exchange of circuits by circuit judges, (2) assignments to hold a regular term or part of a term, (3) assignments to hold a special term or part of such term, (4) or an assignment to hear such particular case or class of cases as may be specified in the order of assignment, an executive order which is so vague and indefinite that it cannot be determined therefrom

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with reasonable certainty what specific duties the assigned judge is ordered and empowered to perform under the assignment, nor the duration thereof, will be held bad, and in a direct attack upon same in prohibition proceedings will be deemed sufficient warrant for issuance of a writ of prohibition absolute against the assigned judge so far as the challenged order is concerned.

"In the present case the court holds the assignment of Judge Adams insufficient because of vagueness and uncertainty in its provisions specifying the particular duties which the assigned judge is to perform, such as the cases or classes of cases he is to hear, or the term or part of term he is to preside over, or the duration of the term of assignment in the circuit which he is to take over on an exchange of circuits as the case may be. For the foregoing reasons the return of the respondent judge to the rule nisi in prohibition will be quashed * * *."

The order here under consideration is subject to the same objection as the one under consideration by the Court in *McCall v. Adams*, supra. It is not an exchange of circuits by circuit judges, it does not assign him to hold a regular term or part of such term or to hold a special term or part of such term, nor does it assign him to hear any particular case or class of cases, nor specify any particular case or class of cases, nor does it limit the duration of such assignment to the holding of any term of court either regular or special, or any part of such term, or to the duration of the trial of any particular case or class of cases.

It is therefore my opinion that the said order does not comply with the contemplated requirements of Section 4838 of the Compiled General Laws of Florida, 1927.

September 23, 1940—O-935.

**GOVERNOR'S AUTHORITY TO APPOINT ADDITIONAL JUDGE
DUE TO INCREASED POPULATION**

Dear Sir:

In response to your request for my opinion as to whether or not you have authority to appoint additional circuit judges in those judicial circuits whose population is shown by the last Federal Census to have increased fifty thousand, or a major fraction thereof, I advise you as follows:

Sub-paragraph (c) of Section 45 of Article V of the Constitution as amended provides as follows:

"There shall be one circuit judge to each judicial circuit but additional circuit judges for judicial circuit may be provided for by law as authorized by Section 43 of amended Article V of this Constitution, but the total number of circuit judges apportioned to any one judicial circuit shall not exceed one circuit judge for every fifty thousand inhabitants, or major fraction thereof, after this amendment shall have been put into effect."

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Section 43 of amended Article V of the Constitution referred to above among other things requires you to appoint additional circuit judges as they may be provided for by the Legislature. In pursuance of the enactment of Section 45 of Article V of the Constitution, the Legislature of 1935 passed Chapter 17085 which provides that there shall be fifteen judicial circuits in this State of not less than fifty thousand inhabitants each and the number of circuit judges in the different circuits should be as follows:

<i>Circuit</i>	<i>Judges</i>	<i>Circuit</i>	<i>Judges</i>
First	Two	Ninth	Three
Second	Two	Tenth	Two
Third	Two	Eleventh	Four
Fourth	†	Twelfth	Two
Fifth	Two	Thirteenth	‡
Sixth	Two	Fourteenth	Two
Seventh	Two	Fifteenth	Two
Eighth	Two		

†Three regular and one additional circuit judge.

‡It was provided therein that the number of judges in the Thirteenth Judicial Circuit should not be affected by that Act but should remain as provided under the then existing law. Under Sections 4769 and 4779, C. G. L. 1927, there were two circuit judges authorized for the Thirteenth Judicial Circuit, however I find that the law regarding the number of circuit judges in the Eleventh Judicial Circuit was changed by Chapter 17774, Laws of Florida, 1937, which law is as follows:

"Section 1. The number of judges of the Eleventh Judicial Circuit of Florida shall be one for every 50,000 inhabitants or major fraction thereof, as may be determined pursuant to law."

You will see from the above outline of the law that the Legislature has provided a set number of circuit judges for all the circuits except the Eleventh Judicial Circuit. The Legislature had the right to make this change under Section 43 and Section 45 of Article V of the Constitution. See Advisory Opinions to the Governor: 136 So. 623; 113 So. 115.

It is therefore my opinion that since the number of circuit judges in each of the circuits except the Eleventh is fixed by the Legislature at a static number, the number of circuit judges therein must remain the same until this number has been changed by law. In the Eleventh Judicial Circuit the number of circuit judges is not static and under the law increases as the population increases and there should be a circuit judge appointed for the Eleventh Judicial Circuit for each 50,000 inhabitants, or major fraction thereof, residing in the said circuit, and if it should be determined by you from the 1940 Federal Census that there is not a circuit judge for each fifty thousand inhabitants, or major fraction thereof, in the Eleventh Judicial Circuit, that

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you should appoint enough additional judges to fulfill the number required by Chapter 17774.

In order to determine whether or not there now exists in the Eleventh Judicial Circuit the number of circuit judges authorized by Chapter 17774, I would suggest that you request the Director of the Census of the United States Government to inform you as to the latest official figures as to the population of the two counties, Dade and Monroe, that compose the Eleventh Judicial Circuit.

October 4, 1940—O-949.

**ACTUAL AND NECESSARY TRAVELING EXPENSES NOT
LIMITED TO THREE HUNDRED DOLLARS A YEAR**

Dear Sir:

In your letter of the 3rd instant, in which you state that Section 4738, Compiled General Laws, 1927, fixes three hundred dollars as the total amount to be allowed circuit judges for traveling expenses, you call my attention to an opinion of this office in which it was held that Chapter 16184, Acts of 1933, fixing the per diem expenses of State employees at \$4.50, did not apply to circuit judges, who are constitutional officers. You then ask my opinion as to whether or not this opinion should be construed to mean that since circuit judges are constitutional officers, they would be entitled to actual necessary and reasonable subsistence expenses in the performance of their duties, even though same may exceed \$300 in any one year.

In answer to your inquiry I would state that the reasoning of the former opinion should be applied to the present question, and it is my opinion that since circuit judges are constitutional officers, and since Section 4 of the Declaration of Rights requires that the courts shall be kept open so that every person shall have a remedy by due course of law, and rights and justice shall be administered without sale, denial or delay, the Legislature cannot by its enactment fetter or interfere in any way with the power of the courts to obey this provision of the Constitution by limiting their expenses to a certain amount, when it is necessary for the judges in the exercise of their constitutional and statutory duties to expend more than \$300 per year for their actual necessary and reasonable subsistence expenses.

November 2, 1940—O-977.

RETIREMENT UNDER CHAPTER 19000, ACTS OF 1939

Dear Sir:

I have your letter asking whether Fred L. Stringer, former Circuit Judge for the Fifth Judicial Circuit of Florida, is entitled to the benefit of retirement pay under the provisions of Chapter 19000, Acts of 1939, Laws of Florida.

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Section 1 of this Act provides as follows:

"Whenever any Circuit Judge has elected to take the benefits of this Act in accordance with the terms hereof, and has served as such Judge for twelve years or more or who is serving the twelfth continuous year as such Judge, continuously or otherwise and has attained the age of sixty years or more, or has served as such Judge for twenty years or more, continuously or otherwise, such Judge may voluntarily resign and retire from his office, and upon such retirement he shall be paid, during the remainder of his natural life, on his own monthly requisition, from the Circuit Judges Retirement Fund hereinafter established, two-thirds of the compensation being paid to such Judge at the time of his resignation and retirement; and there is hereby appropriated annually out of said Circuit Judges Retirement Fund sufficient money to meet the requirements of this section."

It appears that at the time of the passage of this Act Judge Stringer was serving his twelfth continuous year as circuit judge, and was more than 60 years old. He therefore met the requirements of the Act as to service and age which entitled him to take advantage of the Act. Section 5 of the Act provides for the method by which a qualified judge may elect to take the benefits of the Act as follows:

"Any Circuit Judge who may desire to take advantage of this Act shall, within ninety days after the passage and approval hereof, notify the State Comptroller and the State Treasurer to that effect, and thenceforward, so long as such Circuit Judge shall hold office, two per centum shall be deducted from each installment of salary of such Circuit Judge, and said amount so deducted shall be deposited into a special fund hereby established in the State Treasury to be known as the Circuit Judges Retirement Fund."

You have stated that the commission held by Judge Stringer at the time this Act became a law expired May 11, 1939, and that his successor, F. R. Hocker, was appointed by the Governor on May 18, 1939, confirmed by the Senate the same day and took the oath of office the following day, May 19, 1939. You further state that the records of your office do not show any election by Judge Stringer to take the benefits of the Act until a letter was received from him on July 20, 1939, and that this is borne out by a recent letter from Judge Stringer dated September 3, 1940, in which he states that he made election by letter dated July 14, 1939, addressed to you and to the State Treasurer. You further state that no deduction has ever been made from any salary due to him.

You will note that in Section 1 above quoted, and in Section 2, which relates to the retirement of disabled circuit judges, the language used is that "such judge may voluntarily resign and retire from his office." Again in Section 5, above quoted, and in Section 6 relating to the special Circuit Judge for Duval County, the language used is that after notice of the election is given to you and the State Treasurer, "thenceforward, so long as such

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circuit judge shall hold office, two per centum shall be deducted." It is clear from these expressions in the body of the Act and also the first part of the title, "An Act Providing for the Voluntary Resignation and Retirement of Circuit Judges Under Certain Conditions," that for a person to qualify for retirement pay under such Act he must at the time of election to take the benefits hold the office of circuit judge so that he might "voluntarily resign" and that thenceforward so long as he "shall hold office," the required deductions might be made from his salary.

Under the statement of fact set forth, it is my opinion that Judge Stringer failed to make his election while he held the office of circuit judge and that without further legislation, he is not entitled to the benefits under Chapter 19000, Acts of 1939.

SECTION 2

Courts — County Judges

January 19, 1939—O-7.

TWO RULE DAYS PER MONTH—SECTIONS 5202, 5223, 5238, ET
SEQ., COMPILED GENERAL LAWS OF FLORIDA, 1927*Dear Sir:*

This will acknowledge receipt of your letter of January 17 requesting an opinion as to whether or not there can be two rule days per month in a county judge's court.

Section 5202, Compiled General Laws of Florida, 1927, is the applicable statute with reference to the powers, practice and pleading in this court. It reads:

"In all civil matters, his powers, terms and duties shall be the same as those of a *justice of the peace, and the rules of practice and pleading in his court * * * shall be the same as those established by law for justices of the peace courts.*" (Italics ours.)

I find that Section 5223 controls the pleading and practice in justice of the peace courts. I quote the same:

"In all suits in justice of the peace courts based upon causes of action not enumerated in Section 5238, the rules of pleadings and practice governing the circuit courts of the State of Florida shall prevail, and be enforced, except *that there shall be two rule days in each month.*" (Italics ours.)

It is, therefore, my opinion that in all cases not enumerated and provided for in Section 5238, there should be two rule days in your court.

Section 5238, et seq., seems to provide a complete course of action from the commencement of the action to execution and it, of course, controls wherever applicable.

SECTION 3

Courts—Juvenile Judges

November 20, 1939—O-662.

ELIGIBILITY OF AN INCUMBENT TO BE ELECTED

Dear Sir:

Under date of November 16, 1939, you asked whether an incumbent of the office is prohibited from filing as a candidate for, or being elected to the office of Judge of Juvenile Court of Orange County and called attention to Section 5 of Chapter 19113, Acts of 1939, part of which reads:

"No person shall be elected to the office of Judge of said Juvenile Court who holds any official position under the United States, State of Florida, County of Orange or City of Orlando."

This is a rather close question, however, from consideration of the entire Act and the apparent purpose of the provision, I am inclined to the opinion that an incumbent is not prohibited from filing as a candidate and would be eligible to be elected to said office.

The preceding part of Section 5 of the Act provides that a person to be eligible to hold office shall have certain qualifications, including the qualification that he shall be not less than 25 years of age, and an attorney in good standing, authorized to practice before the Supreme Court of Florida, *or* one who has engaged at least three years in educational or social welfare work among children, *or* who has filled the office of Juvenile Judge of any court having jurisdiction over dependent and delinquent children; and the purpose of the clause to which you call attention was apparently to prohibit one elected to said office from holding during such tenure another official position which might conflict with the duties of that office or detract from attention to the duties thereof.

In the event that the courts do not construe said provision in accordance with this opinion, there is authority under which an incumbent of the office would be eligible for election if he resigns before the day of the general election, and perhaps if he resigns before assuming the new office. *Davis as Attorney General, etc., v. Crawford*, 95 Fla. 438, 116 So. 41; *State v. Haskell*, 72 Fla. 176, 72 So. 651.

SECTION 4

Courts — Miscellaneous

September 29, 1939—O-590.

COURT REPORTER FEES FOR TRANSCRIPTS OF RECORD IN
CRIMINAL CASES*Dear Sir:*

This is in reply to your inquiry of September 27, 1939.

Section 4876, Compiled General Laws 1927 provides:

"Upon demand of the State Attorney or the defendant in any criminal case, or the presiding judge, such reporter shall furnish with reasonable diligence a typewritten transcript of the testimony and proceedings, together with the charges of the court, and shall receive therefor the same fees for such transcript as provided in Section 4874, and the costs for same shall be taxed as costs in the case."

Section 4874, Compiled General Laws, 1927, fixes the fees mentioned in Section 4876.

Section 2825, Compiled General Laws, 1927, provides that the county fine and forfeiture funds "shall be paid out only for criminal expenses, fees and costs where the crime was committed in the county, and the fees and costs are a legal claim against the county, in accordance with the provisions of this chapter," following with the provisions relating to the mode of approval and payment of claims against such funds.

Section 2826, Compiled General Laws, 1927, establishes a statutory portion of such funds by authorization of a special tax. The amount of tax varies in the counties under various Acts affecting one or more counties.

The constitutional part of the fine and forfeiture funds consists of the fines and forfeitures collected under the penal laws of the State and was established by Section 9 of Article XVI of the Constitution of 1885.

It is my opinion, upon consideration of the several provisions of the statute and the Constitution, that the fees of court reporters for furnishing transcripts of testimony and proceedings and the charges of the court, under Sections 4876 and 4874, if demanded and furnished in accordance therewith, are taxable in the case in which it is used, as costs against the State or the defendant according to the result of the cause, and if properly taxed against the State, that such fees may be lawfully paid from the statutory portion of the fine and forfeiture fund of the county where the alleged crime was committed, upon audit and approval by the board of county commissioners in the matter of other valid claims against the fine and forfeiture fund.

See: *State ex rel. Crim v. Juvenal*, 121 Fla. 69, 163 So. 569; *Crandon v. Nelson-Bullock Co.*, 109 Fla. 341, 147 So. 532.

No opinion is expressed upon the question whether such fees may be paid from the constitutional portion of the fine and forfeiture fund.

COURTS — Miscellaneous

Although it may not be strictly necessary, I think it would be advisable for such transcripts as may be necessary to the proper prosecution of a criminal charge to be obtained upon motion by the State Attorney and order of approval by the presiding judge finding the necessity of having such transcript and demanding preparation thereof by the reporter.

November 3, 1939—O-635.

**COURT REPORTER FEES—REPORTING AND TRANSCRIBING
CHARGES TO THE JURY IN OTHER THAN
CAPITAL CASES**

Dear Sir:

An answer to the question in your letter of November 2, 1939, whether it is now mandatory that charges to the jury in other than capital cases be taken down by the court reporter and transcribed and filed by him in the cause depends largely upon the view which the Supreme Court will take of the precise purpose and intent of Section 215 (2) of the Criminal Procedure Act, Chapter 19554, Acts of 1939, and said Act generally. Said Section provides that:

"Charges in other than capital cases shall be taken by the Court Reporter and transcribed by him and filed in the cause."

As you say, there have been many cases in which neither the charges nor the testimony were taken down by a reporter and which it was not necessary to do so. There will continue to be such cases, and apparently there is no similar provision in regard to reporting the evidence.

In the absence of direct precedent, it is my opinion that it would not be reversible error for the charges not to be taken, transcribed and filed by the court reporter in a particular case if request therefor is not made by or in behalf of the defendant; however, I think that this view should be made known to attorneys representing defendants in order that they may make such request if desired and so that they will not assume that the charges will be taken down and filed in any event. (See generally 16 C. J. 809, Sec. 2055, and 60 C. J. 23, et seq., Sec. 8.)

October 31, 1939—O-626.

**WITNESS FEES AND MILEAGE OF BEVERAGE DEPARTMENT
SUPERVISORS IN CRIMINAL CASES**

Dear Sir:

Under date of October 26 you called attention to Section 43, paragraph (d) of the Criminal Procedure Act, Chapter 19554, Acts of 1939, which provides:

"(d) No Sheriff, Deputy Sheriff, Constable, Deputy Constable, Highway

COURTS — Miscellaneous

Patrolman, or other person employed or paid by the State or any county thereof as a law enforcement officer, shall be entitled to witness fees or to mileage when summoned to testify in any court sitting in the county in which he holds office, is employed, or has his residence."

Also Sub-section "a" of Section 1-A, Chapter 19301, Acts of 1939 amending the Beverage Act, which provides:

"Such Supervisor shall have all the powers of Deputy Sheriffs in the enforcement of the beverage laws of this State and in the prosecution of offenders against such laws." And you ask whether supervisors in the Beverage Department are entitled to witness fees or mileage when summoned to testify in criminal cases.

Upon consideration of said statutory provisions, it is my opinion that a Supervisor in the Beverage Department is not entitled to witness fees or mileage when summoned to testify in criminal cases in a court sitting in the county in which the supervisor holds office, is employed or has his residence; and that if a supervisor is assigned to more than one county for performance of his regular duties he is employed in each of such counties within the language and intent of said subsection of the Criminal Procedure Act.

September 30, 1939—O-588.

**WITNESS FEES AND MILEAGE TO LAW-ENFORCEMENT
OFFICERS TESTIFYING BEFORE GRAND JURY**

Dear Sir:

In reply to your inquiry of September 29, it is my opinion that paragraph D of Section 43 of the Criminal Procedure Act, Chapter 19554, Acts of 1939, applies to officers testifying before grand juries and, therefore, that after the effective date of the Act at noon on October 10, 1939, law-enforcement officers of the kinds designated in said Act will not be entitled to witness fees or mileage when summoned to testify before a lawful grand jury in the county where they hold office, are employed or have their residence.

October 31, 1939—O-627.

**WITNESS FEES AND MILEAGE OF CONSTABLES IN
CRIMINAL CASES**

Dear Sir:

Upon consideration of Section 43 (d) of the Criminal Procedure Act, Chapter 19554, Acts of 1939, and the statutes relating to constables, my opinion is the same as yours that the intent of said section is plain and that constables are within its scope so that now a constable is not entitled to witness fees or mileage when summoned to testify in criminal cases in a court sitting in the county where he holds office, is employed or has his residence.

COURTS — Miscellaneous

December 22, 1939—O-684.

**WITNESS FEES AND MILEAGE—FRUIT INSPECTION
EMPLOYEE***Dear Sir:*

In your letter of December 20, 1939, you inquired whether the payment of witness fees and mileage to a fruit inspection employee is prohibited by Section 43 (d) of the Criminal Procedure Act, Chapter 19554, Acts of 1939.

I understand that the employee involved has the status of inspector for which provision was made by Chapter 16855, Acts of 1935, particularly Sections 14-18 of said Act as amended, and that he does not have authority to arrest or general police power.

It is my opinion that the payment of witness fees and mileage to such employee for appearing and testifying in a criminal prosecution is not prohibited by said section of the Criminal Procedure Act.

January 15, 1940—O-699.

**WITNESS FEES AND MILEAGE TO LAW-ENFORCEMENT
OFFICERS FOR TESTIFYING BEFORE
STATE ATTORNEYS***Dear Sir:*

In reply to your recent inquiry, it is my opinion that Section 43 (d) of the Criminal Procedure Act does not prohibit payment of witness fees or mileage to law-enforcement officers for testifying before State attorneys or county solicitors in investigations conducted by them preparatory to filing informations in criminal cases.

This result follows from the language of the Act prohibiting payment of compensation to such officers "when summoned to testify in any court sitting in the county, etc.," and relates to testimony taken before State attorneys and county solicitors rather than in a court "sitting in the county, etc."

I understand that by custom and administrative rulings such compensation has been paid in a number of counties; however, I express no opinion, except as to the effect of the Criminal Procedure Act, as the question of compensation under the prior law was not raised.

May 25, 1940—O-802-1.

WITNESS FEES—CONSTRUCTION OF LAW*Dear Sir:*

On May 13, 1940, I wrote you a letter containing an opinion as follows:

COURTS — Miscellaneous

"Replying to your letter of April 17:

"Sections 39, 40 and 41 of the Criminal Procedure Act which became effective October 10, 1939, deal with the question of securing the presence of witnesses in cases wherein the defendant is held to answer on any charge of murder, rape, robbery, arson or kidnaping. The stated sections of the Criminal Procedure Act provide for a method of holding witnesses in custody in default of the posting by the witnesses of security required by the magistrate.

"Subsection 5 of Section 41 of the Criminal Procedure Act is as follows:

"'A witness so committed shall be entitled to his fees as a witness for the period of his commitment.'

"In my opinion Subsection 5 of Section 41 quoted above requires payment of the fees of the two witnesses about whom you inquire for a period of fifty-seven days during which they were in custody in default of the posting of a bond fixed by the magistrate, since in your letter you state that the defendant in the case was charged with murder after the Criminal Procedure Act became effective."

Since that opinion was written the question has come up as to whether or not a State prisoner properly incarcerated in the State prison at Raiford, Florida, is entitled, while in custody for an offense committed by him, to witness fees for testifying in another and separate case involving other defendants. In the particular case in which the question arose, the State prisoner was sent from the State prison in Raiford to a local county jail in order to be available as a witness in a subsequent case, and was held in the county jail for a number of weeks until the case in which he was to be a witness was reached on the calendar.

Under the circumstances it has been deemed necessary to write this letter qualifying the original letter of May 13, 1940 by stating that the views expressed in the letter of May 13 are not applicable to a person who was already in custody for another crime; but are only applicable to one who was taken in custody as a witness only, and who lost time from his own private pursuits during the period of his being held as a material witness. The views expressed in my letter of May 13 are not changed in any way, except that they should be limited as hereinabove set out.

November 27, 1939—O-663.

**WITNESS FEES—PAYMENT TO DEPUTY SHERIFFS NOT
UNDER BOND**

Dear Sir:

Referring to letter of November 15, 1939, * * * it is my opinion that a deputy sheriff duly authorized and appointed by the sheriff as such, is within the provisions of Section 43 (d) of the Criminal Procedure Act, Chapter 19554, Acts of 1939, notwithstanding he may not have entered into a bond as

COURTS — Miscellaneous

such deputy, and, therefore, that he is not "entitled to witness fees or mileage when summoned to testify in a court sitting in the county in which he holds office, is employed, or has his residence," as stated in the Act.

August 16, 1939—O-539.

**JUROR FEES—PAYMENT IN PROCEEDINGS UNDER
SECTION 5407, C. G. L.**

Dear Sir:

This will acknowledge receipt of your letter of August 15 enclosing a letter from the Honorable Thomas B. Bird, Judge of the Circuit Court, relative to the payment of jurors in civil cases under Section 5407, et seq., of the Compiled General Laws of Florida.

Judge Bird states that under the opinion of the Supreme Court in the case of *Jennings v. Peacock*, 126 Fla. 743, 171 So. 821, he cannot require deposit of jury fees and cannot deny trial by jury. His construction of this decision is in accordance with my opinion to the Honorable W. M. Wainwright under date of August 2, 1939, copy of which I am enclosing. The question for consideration is:

Would your office be justified in honoring a requisition for jury fees in a case coming under the above section of the statutes?

In my opinion it would; this being the procedure set forth under Section 4479 of the Compiled General Laws of 1927. It seems to be authorized by Section 4474, Compiled General Laws of 1927, which provides:

"All jurors in all cases in the courts of the county judges of this State shall receive three dollars for each day's attendance or fractional part thereof, and also five cents per mile for actual distance necessarily traveled to and from the place of attendance. Jurors not summoned, but called to complete a panel shall not be paid mileage."

Section 5410 was the Section which provided that the party who desired a jury trial would have to deposit sufficient money to pay the fees but the Supreme Court in the case above referred to in effect held this section inoperative. This in my opinion leaves the general law with reference to jurors in county courts in full effect and Section 4476 is ineffective insofar as it provides: " * * * the party demanding the same may be required by the court or judge to deposit an amount sufficient to cover the cost of such jury trial."

December 6, 1939—O-674.

**JURORS NOT ALLOWED MILEAGE OUTSIDE COUNTY OF
RESIDENCE**

Dear Sir:

On September 27, 1939, I referred to you several letters addressed to me.

COURTS — Miscellaneous

The subject of inquiry relates to the question of mileage to which a juror serving in court in Orlando was entitled, in view of the circumstance that the juror had come from Miami to Orlando. That is, whether he was entitled to mileage only from his home in Orlando, or from Miami where he was working.

I note the statement in Judge Smith's letter, "his statement is to the effect that he was employed and living at Miami when the summons was left with his wife at his home in Orlando; that she mailed it to him at Miami and he came here in response to same."

One of the qualifications for a juror is that he must be a resident for six months in the county in which he serves. (Section 4443, Compiled General Laws.)

When the clerk of the circuit court issues a venire for the petit jury, he delivers same to the sheriff, who in turn serves same by sending notice thereof through registered mail to the place of residence of the persons named in said venire. (Section 4464, Compiled General Laws.)

In addition to the per diem allowed jurors, they are entitled to receive 5 cents per mile for every mile necessarily traveled in going to and returning from court by the nearest practicable route. (Section 4473, Compiled General Laws.)

There is no provision of law for serving petit jurors outside the county of their residence. Neither is there any provision of law for the member of a prospective juror's family forwarding notice to him outside of the county, or elsewhere, that notice has been left for him at his place of residence as required by Section 4464, Compiled General Laws.

In other words, process for the service of persons drawn to serve as jurors does not run throughout the State as is the case with certain other forms of process. Section 4464 requires that the notice be mailed at least seven days prior to the sitting of the court. Obviously it was contemplated that the prospective juror would within those seven days receive his notice at his residence.

I am therefore of the opinion that the Legislature intended that the 5 cents per mile for every mile necessarily traveled in going to and returning from court by the nearest practicable route, should be computed from his residence in the county in which he serves as a juror.

August 2, 1939—O-507.

**TENANTS NOT REQUIRED TO PAY JURY FEE IN EVICTION
PROCEEDINGS**

Dear Sir:

This will acknowledge receipt of your letter of August 2 propounding the following question:

COURTS — Miscellaneous

"* * * Please advise what effect on Section 5410, Compiled General Laws, 1927, the decision of the Supreme Court in *State v. Peacock*, 171 So. 821, has."

Section 5410, C. G. L. 1927, provides:

"Party demanding jury to deposit costs.—Should either party desire that such issues be tried by jury, such party shall, on or before the return day of such summons, file notice in writing with the clerk of said court, and shall, at the same time, deposit sufficient money to pay jury fees: Provided, that if such issue be tried in regular term, and trial by jury be so desired, it shall be tried by the regularly empaneled jury for such term, and, in such case, no deposit shall be required."

The Court held in the case above referred to: "* * * a defendant brought into court in such cases and required to submit to the jurisdiction of the forum for the adjudication of his rights of property or of liberty may look with confidence to the guarantees contained in the organic law and demand and have a trial by jury. * * * If the State has been derelict in not providing a source from which jurors may be paid, such failure cannot be charged to a defendant required to answer the process of the State. If it turn out that the jury must serve without pay, it is unfortunate, but even such condition will not warrant a violation of the sacred right to trial by jury."

And so it is that Section 5410 is now inoperative insofar as the defendant is concerned in cases coming within the meaning of such statute.

March 8, 1940.—O-751.

WITNESSES AND JURORS—RIGHT TO PER DIEM AND MILEAGE
WHEN SUMMONED FOR BOTH SERVICES

Dear Sir:

Referring to your letter of March 6 presenting the inquiry of Clerk Roy Caruthers it is my opinion that a person summoned to serve as a witness and as a juror on the same day is entitled to per diem compensation in both capacities if he does attend and serve or remains available to serve in both capacities on the day to which he is summoned but that he is entitled to reimbursement for mileage only in the capacity in which he is first summoned.

No opinion is expressed upon the result of claims for per diem and mileage if such a person were excused or prevented from serving as a juror or witness because of service in one of those capacities as a different result might follow in such cases.

January 31, 1940.—O-723.

WOMEN NOT QUALIFIED TO SERVE AS JURORS

Dear Sir:

I acknowledge receipt of your letter of the 29th instant, asking that I

COURTS — Miscellaneous

give you my views in respect to the qualifications of women to serve on juries and any other comment I care to make in this connection.

The qualifications of jurors, grand and petit, have been fixed by the State through legislative enactment, and are found in Section 4443 (2771) of the Compiled General Laws of Florida, one of which qualifications is that grand and petit jurors shall be taken from the *male* persons.

I know of no instance where this particular question has been adjudicated by the Court, but there are cases in which others of the qualifications fixed by law have been upheld by our Supreme Court. The only reason I know why women may not lawfully serve as jurors is because the Legislature in its discretion has not seen fit to extend the qualifications to include female persons as well as male persons.

SECTION 5

Courts — Municipal

November 2, 1939—O-654.

MUNICIPAL COURTS—FLORIDA DRIVERS LICENSE LAW NOT
UNDER JURISDICTION*Dear Sir:*

At a conference several days ago, with Mr. Smith, your chief assistant, several problems were discussed in connection with the Florida Drivers License Law. Those problems can be substantially stated as follows:

1. Can municipal courts, under Section 37 of the Florida Drivers License Law, require the surrender of all operators' and chauffeurs' licenses held by a person convicted in said court of any offense for which the Florida Drivers License Law makes mandatory the revocation of such licenses by the Department of Public Safety, even though the conviction is for violation of municipal ordinances rather than State laws?

2. Can municipal courts require the surrender of a license under Section 37 of the Florida Drivers License Law for conviction of any offense which does not make mandatory the revocation of such license under the provisions of Section 38 of the Act?

3. Is a municipality precluded from passing ordinances to deal with violations of the Florida Drivers License Law?

It is my opinion that municipal courts do not have the authority to require the surrender of licenses upon conviction of persons for violation of municipal ordinances. The surrender of such licenses can only be required by courts having jurisdiction of offenses against State laws. The record of convictions in municipal courts, however, for the offenses defined in Section 38 of the Florida Drivers License Law, even though the convictions are necessarily for violations of municipal ordinances, should be sent to the Department of Public Safety to be considered by that department as evidence authorizing a suspension or revocation of licenses pursuant to the provisions of Section 39 of the Florida Drivers License Law.

Answering the third question, municipalities would have no authority to enact ordinances dealing with violations of the Florida State Drivers License Law. To hold otherwise, would be to authorize municipalities to enlarge or restrict by ordinances the local operation of State laws. This does not mean, however, that municipalities do not have the authority vested in them by their charters and other laws of the State, to pass ordinances dealing with regulation of motor vehicle traffic.

SECTION 6

Courts — State Attorneys

October 20, 1939—O-615.

AUTHORITY OF GOVERNOR TO APPOINT ASSISTANTS

Dear Sir:

We have your request as to what would be the proper steps to take in order to carry into effect your intention of giving Mr. William C. Norvell a four-year appointment as Assistant State's Attorney for the Tenth Judicial Circuit. You understand, of course, that Mr. Norvell was appointed by you on July 31, 1939, for a term from the 31st day of July, 1939, until the end of the next ensuing session of the Senate, unless an appointment be sooner made and confirmed by the Senate. I understand it is your desire now either to issue a new commission or to issue an amended commission in order to carry this into effect.

My suggestion would be that if you originally intended to make the appointment for four years, that you issue Mr. Norvell a new commission in practically the same form as the other, except add the following at the beginning of the commission:

"WHEREAS, a commission was issued dated the 31st day of July, 1939, appointing William C. Norvell to the office of Assistant State's Attorney of the Tenth Judicial Circuit from the 31st day of July, 1939, to the adjournment of the next ensuing session of the Senate, and

"WHEREAS, the term of office in said commission should have been for a period of four years ending July 30, 1943, and such was my intention at that time,

"NOW, THEREFORE, by authority vested in me as Governor of the State of Florida, I do hereby amend said commission nunc pro tunc so as to read as follows: * * *."

After this the commission in usual form can follow, appointing Mr. Norvell for the four-year term.

October 7, 1939—O-602.

SESSION LAWS TO BE FURNISHED TO ASSISTANTS

Dear Sir:

In your letter of the 5th instant you refer to Section 1984 of the Compiled General Laws of Florida, 1927, and state that you have been called upon by the Assistant State Attorneys throughout the State to furnish them copies of the Session Laws. You observe in your letter that the statute referred to does not direct you to furnish these officials copies of the laws, and thereupon request my opinion in the matter.

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The section of the statute referred to in your letter was originally enacted as Section 3 of Chapter 1904, Acts of 1872, and later amended by Section 1 of Chapter 5945, Acts of 1909. At the time of the enactment of this statute and its amendment in 1909, the only prosecuting attorney for the circuit court was the State attorney. Since that time assistant State attorneys have been provided for in most of the circuits, who are likewise made prosecuting attorneys for the circuit courts.

It is my opinion that the provision of law referred to should be construed to require that the assistant State attorneys be furnished copies of the laws, the same as the State attorneys. It is my opinion, therefore, that you should furnish to the several assistant State attorneys copies of the statutes in like manner as they are furnished to the State attorneys.

January 21, 1939—O-6.

TERM OF OFFICE—SEVENTH JUDICIAL CIRCUIT

Dear Sir:

This will acknowledge receipt of your letter requesting my opinion as to your right to hold a commission as State attorney of your circuit from April 22, 1937, for a period of four years thereafter. You state that you have a private opinion to the effect that under the amendment to Article V of the Constitution of Florida relating to the judiciary and known as Section 45, that the term of office of State attorneys should run in cycles of four years, beginning on August 2nd, 1935, which is stated to be the effective date of the Act passed by the Legislature in compliance with the constitutional amendment.

With this I cannot agree. The amendment specifically provides:

“* * * No judicial circuit existing at the time of the ratification of this amendment shall be affected, altered, or abolished, except in the manner provided in this amendment for carrying the same into execution *nor shall any existing circuit judge or State Attorney be disturbed in the tenure of his office until the expiration of any commission held by him on the date this amendment is ratified.*” (Italics ours.)

It seems clear to me that you were not affected by this constitutional amendment nor Chapter 17085, Acts of 1935, until your commission had expired since you did not elect to resign and accept a new commission under the 1935 Act, which, according to the Supreme Court commenced July 30, 1935, and that you cannot now be heard to say that “my present commission although reciting that it runs for a period of four years from April 22, 1937, in effect expires July 30, 1939.”

In an advisory opinion to the Governor, 162 So. 346, it is said (text page 350):

“The obvious intent of Section 45, Art. V, and of Section 3 of Senate

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Bill No. 4, is that circuit judges holding commissions as such on November 6, 1934, who are not given new commissions as circuit judges under Section 45, Article V, 'shall severally continue in office and exercise jurisdiction until (the expiration of) their then existing term or terms of office as Judge or Judges of the Circuits, respectively, in which the county of their resident may be included.'

"As you state that Hon. L. L. Fabisinski has resigned the commission as circuit judge held by him on November 6, 1934, * * *

"* * * As Hon. L. L. Fabisinski resigned his former commission and was appointed by the Governor and confirmed by the Senate under Section 45, Art. V, Constitution, and Senate Bill No. 4, as additional judge of the First Judicial Circuit of Florida, he should be commissioned for a term of six years, such term to begin July 30, 1935, which is 'sixty days after' Senate Bill No. 4 'became a law' * * *."

In the case of *State v. Bird*, 163 So. 248, the Supreme Court quoted the above advisory opinion to the Governor with approval.

May 10, 1939—O-263.

ASSISTANT, STATUS IF OR IF NOT CONFIRMED BY SENATE

Dear Sir:

I am in receipt of your letter of the 11th making the following inquiries:

"1. If I should send in the name of an Assistant State Attorney to the Senate and subsequently the appointee should fail of confirmation, can I then give such appointee a recess appointment?

"2. If I send in the name of an Assistant State Attorney and he should fail of confirmation, if I send in no other appointment and make no recess appointment, will the person now holding office continue to hold the office as a hold over?

"3. If the Assistant State Attorney approved at the last session of the Legislature by the Senate is in office and I fail to send in the name of any appointee, will he continue to hold office until the next session of the Legislature or until such time as I make a recess appointment?"

In answer to your first question, I would state that if you send in the name of an assistant State's attorney to the Senate for confirmation and the Senate fails to confirm the person whose name you sent in, then after the Senate has adjourned you may reappoint such person by a recess appointment. See *State v. Murphy*, 32 Fla. 138, 13 So. 705.

In answer to your second question, I would say that if you send in the name of an assistant State's attorney to the Senate for confirmation and he fails to be confirmed, and if you send in no other name for confirmation and make no recess appointment, the person holding the office will continue in

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office until a successor has qualified. See Section 14 of Article XVI of the Constitution which provides as follows:

"All State, county and municipal officers shall continue in office after the expiration of their official terms until their successors are duly qualified."

In answer to the third question, I would state that if an assistant State's attorney confirmed by the Senate at the last session of the Legislature is holding office and you fail to send in the name of any appointee, he will continue to hold office until you make a recess appointment or until the adjournment of the next session of the Legislature.

CHAPTER V

ELECTIONS

SECTION 1

In General

March 25, 1940—O-766.

ABSENTEE VOTING—ELECTOR MAY VOTE IN ANY OTHER
COUNTY WHEN UNAVOIDABLY ABSENT FROM HIS
PRECINCT AND MAY VOTE IN OWN COUNTY
ON CERTAIN DAYS BEFORE DATE OF
ELECTION—CHAPTER 7380, ACTS
OF 1917, SEC. 429 ET SEQ.,
C. G. L., CHAP. 11824,
ACTS OF 1927

Dear Sir:

In reply to your letter of March 23 I wish to advise that the Supreme Court of Florida said in a very recent case, to-wit, that of *State v. Rinehart*, 192 So. 819, decided on January 17, 1940, that:

"Chapter 7380, Acts of 1917, Section 429, et seq., Compiled General Laws of 1927, provides for absent voting in any other county of the State when the elector is unavoidably absent from the polling place. Chapter 11824, Acts of 1927, provides for the elector to vote in his home county on certain days before the day of the election for like reasons." (Emphasis ours.).

The Court also in this case held that Chapter 16986, Acts of 1935, " * * * is so ambiguous and loosely constructed that it cannot be enforced if purity of the ballot is to be preserved * * *."

Section 1 of said Act provides:

"Section 1. That any qualified elector who is required to be absent from the State of Florida for a period of more than fifteen days next prior to and including the day of any primary, general, school, municipal, or special election, may make written request by mail to the County Judge of the County of his or her legal residence, or to the Clerk of the municipality, in case of municipal elections, for an official ballot to be used at his or her voting precinct or ward at such election."

It therefore follows that the only legal method for casting absentee ballots by duly qualified electors in the State of Florida is in the manner first above mentioned, i. e., under Chapter 7380, Acts of 1917, Section 429, et seq., Compiled General Laws of Florida, 1927, which provides for absentee voting

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in any other county of the State when the elector is unavoidably absent from the polling place, and under Chapter 11824, Acts of 1927, which provides for the elector to vote in his home county on certain days before the day of the election for like reasons.

December 27 1939—O-677.

**RE-REGISTRATION OF ELECTORS EMPLOYED BY
FEDERAL GOVERNMENT**

Dear Sir:

This will acknowledge receipt of your letter of December 26. You state that all electors residing in the City of Lakeland are required to register every two years and that a good many persons in Lakeland hold positions in Washington as clerks, et cetera, with the Federal Government and that such persons are applying to you for transfer of their registration under Chapter 19333, Acts of 1939. You ask me to interpret the phrase in Section 1 of this Chapter, "an official position with the Government of the United States," and you propound this question:

"Did the Legislature intend to include any person employed in a clerical position in any of the governmental departments in Washington or did the Legislature intend to include only persons who hold commissions from the United States?"

I have examined this entire Act as I do not think it would be proper to attempt to determine the meaning of the phrase you have requested me to interpret without taking into consideration such other language in the Act as will throw some light upon this question, keeping in mind at all times that the Act should be so construed as to carry out the intention of the Legislature.

The affidavit seems to be the most important part of the Act in that when the affidavit is made in the form provided by the Legislature, it is then the duty of the supervisor of registration to make the transfer. You will note that the only part of the affidavit that refers at all to the person's employment requesting the transfer is the last sentence thereof. It reads:

"That he (she) holds a position under the Government of the United States and by reason of the duties attendant thereto it is impossible for him (her) to appear personally before said supervisor of registration at any time within the time allowed by law for such registration."

I do not find the word "official" in this affidavit. I am therefore of the opinion that the Legislature intended this Act to apply to any person employed in any of the governmental departments in Washington who by reason of the duties attendant thereto find it impossible to appear before the supervisor of registration within the time allowed by law for registration.

I, therefore, answer your question in the affirmative.

ELECTIONS — In General

November 20, 1939—O-658.

ELECTION—INSTANCES OF FREEHOLDER*Dear Sir:*

In reply to your inquiry of November 16, 1939, asking whether persons of the status herein mentioned would be freeholders for the purpose of voting in elections restricted to freeholders, it is my opinion that one who holds title by inheritance to an undivided interest in real estate by reason of the death of his kinsman intestate would be a freeholder for such purpose whether or not the estate has been divided among the heirs.

It is my opinion that a husband whose wife holds real property solely as her own property is not a freeholder for such purpose merely by reason of the marital relationship because he does not by reason of such relationship have an interest in such property.

February 15, 1940—O-731.

**REGISTRATION PREREQUISITE TO VOTE—POLL TAX NOT
REQUIRED***Dear Sir:*

Replying to your letter of the 9th instant, I refer you to Section 248 of the Compiled General Laws of Florida, 1927, which provides:

"No person shall be permitted to vote, or shall such vote be counted, unless the person registers to vote in the election precinct in which he or she shall have his or her permanent place of residence."

Also Section 296, requiring in case of the removal of an elector from one district to another district in the same county, such elector to notify the supervisor of registration of such change of residence, and return his certificate of registration to the supervisor who shall at once enter the fact in the proper registration books and give such elector a certificate of transfer of registration in accordance with such change of residence.

This latter requirement would not be necessary where the elector is required to re-register. The question of where the permanent place of residence is, is to be determined by the facts in each individual case.

You also inquire whether candidates for office are required to pay poll taxes as a qualification therefor.

By Section 383 of the Compiled General Laws of Florida, 1927, every candidate for nomination to any office should swear "that he has paid his poll taxes legally due." This requirement appears nowhere else in the law.

By Section 3 of Chapter 19663, Laws of Florida, Acts of 1939, the Legislature amended the form of candidates' oath fixed by Section 383, Com-

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piled General Laws, and eliminated therefrom the language above quoted. It follows, therefore, that since the effective date of Chapter 19663, Acts of 1939, candidates for nomination to office are not required as a legal qualification therefor to pay any poll taxes.

March 21, 1940—O-762.

ELECTIONS--PERSONS UNABLE TO WRITE ARE QUALIFIED
ELECTORS AND SHOULD BE ALLOWED TO VOTE RE-
GARDLESS OF SECTION 1 OF CHAPTER 18407,
LAWS OF FLORIDA, ACTS OF 1937—SEC.
375, COMP. GEN. LAWS, 1927, READ
IN PARI MATERIA WITH
SAME—ARTICLE IV,
CONSTITUTION

Dear Sir:

This will acknowledge receipt of your letter of recent date requesting my opinion with reference to the procedure which should be followed to take care of a class of persons who cannot read or write who wish to register and vote in counties where there are voting machines.

You state that Section 375 of the Compiled General Laws of 1927 is broad enough to take care of persons who cannot read or write to register. You also state:

" * * * The point of registration is very clear but the question of concern has to do with the requirement under Chapter 18407, Laws of Florida, Acts of 1937. Section 1 of this Act requires each and every voter to sign an identification slip and the signature on such slip must be compared with the signature on the registration book. A person in this class being unable to write the Supervisor of Registration wrote his or her name on the registration book and made such notation as required under Section 1 of the Act, supra.

"Naturally where the person appearing at the voting place to vote cannot write the question is how signatures can be compared or what method of identification can be employed to ascertain if the person appearing is the same person who was registered."

I have carefully considered this question in the light of our Constitution and Statutes that you have referred to. It is conceded by all authorities that the right to vote is a political right or privilege to be given or withheld at the exercise of the law-making power of the sovereignty. It can emanate only from the people, either in their sovereign statement of the organic law or through legislative enactment which they have authorized. 20 C. J., Elections, page 60.

It is also well settled that the enumeration in a State Constitution of the class of citizens who shall be permitted to vote is to be taken as to all

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matters within the purview of the provision as a complete and final test of the right to the exercise of that privilege and that the Legislature can neither take from nor add to the qualification there set out unless the power to do so is expressly or by necessary implication conferred upon it by the Constitution itself.

In view of these well-recognized principles of law, it becomes necessary for me to ascertain what our State Constitution has said with reference to the qualification of electors since this is the first source that must be consulted. I find that this question is covered by Article VI of our Constitution. Section 1 provides:

"Every male person of the age of twenty-one years and upwards that shall, at the time of registration, be a citizen of the United States, and that shall have resided and had his habitation, domicile, home and place of permanent abode in Florida for one year and in the county for six months, shall in such county be deemed a qualified elector at all elections under this Constitution * * *."

(Of course since this time, suffrage has been extended to women.)

Section 2 provides that:

"The Legislature, at its first session after the ratification of this Constitution, shall provide by law for the registration of all the *legally qualified voters in each county* * * *."

Section 3 provides:

"Every elector shall at the time of his registration take and subscribe to the following oath: 'I do solemnly swear or affirm that I will protect and defend the Constitution of the United States and of the State of Florida, that I am twenty-one years of age, and have been a resident of the State of Florida for twelve months and of this county for six months, and I am 'qualified to vote under the Constitution and laws of the State of Florida.'"

Section 4 provides:

"No person under guardianship, non compos mentis or insane shall be qualified to vote at any election, nor shall any person convicted of felony by a court of record be qualified to vote at any election unless restored to civil rights."

From an analysis of the foregoing Sections of our organic law, it is apparent that it is not necessary for an elector to be able to read or to write to qualify as an elector unless it can be said that Section 3 should be so construed for the reason that it provides that every elector shall subscribe to the oath therein set forth if the word "subscribe" is to be construed as to mean the written signature of the elector by his own hand.

This office previously ruled on October 12, 1936, with reference to the word "subscribe" as follows:

"The word 'subscribe' has been construed to mean the signing of a per-

ELECTIONS — In General

son's name, however, we find Baldwin's Century Edition of Bouvier's Law Dictionary cites Supreme Court opinions where it is said: 'Subscribe may sometimes be construed to mean to give consent to or to attest.'"

This opinion was reaffirmed under date of April 28, 1938, and we at that time called attention to the fact that Section 375, Compiled General Laws of Florida, 1927 (you also refer to this Section in your letter) indicates:

"That a person may register without being able to sign his name on account of physical infirmity or on account of illiteracy, and the Supervisor of Registration in addition to entering such fact shall enter as full a description of such person as possible."

I have also carefully examined a legal compilation known as "Words and Phrases Judicially Defined," and I find that a great majority of the courts have held that the word has been construed to include the mark of a person who cannot write, his name being written near it and witnessed by a person who writes his name as a witness. WORDS & PHRASES, Volume 7, page 6727, et seq.

One definition given there is:

"The word 'subscribe' when used in reference to the authentication of a writing or document, ordinarily implies that the name of the party who subscribes is set by him or by his authority at the bottom or end of the writing or document."

I prefer to adopt the definition of this word 'subscribe' that will not disfranchise any large class of voters because I think that the proper construction to adopt is one most favorable to the elector. I am, therefore, of the opinion that since the Constitution of our State has fixed the qualifications of an elector, it is beyond the power of the Legislature to require as a condition of registration qualifications in addition to those set forth in our fundamental law, 20 C. J., page 66, and that Chapter 18407, Laws of Florida, Acts of 1937, must be read in *pari materia* with Section 375 of the Compiled General Laws of Florida, 1927. Otherwise, it would be necessary for me to say that Section 1, Chapter 18407, Laws of 1937, was unconstitutional because it required every voter to sign an identification slip and that same must be compared with signature on the registration books.

This law was no doubt designed to protect the sanctity of the ballot box. I find that such a contention was disposed of by the Supreme Court of Michigan in the case of Attorney General v. Detroit, 78 Mich. 545, 44 N. W. 388, in the following manner:

"The object of a registry law, or of any law to preserve the purity of the ballot box, and to guard against abuses of the elective franchise, is not to prevent any qualified elector from voting, or unnecessarily to hinder or impair his privilege. It is for the purpose of preventing fraudulent voting. In order to prevent fraud at the ballot-box, it is proper and legal that all needful rules and regulations be made to that end; but it is not necessary that such

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rules and regulations shall be so unreasonable and restrictive as to exclude a large number of legal voters from exercising their franchise. Nor can the Legislature, in attempting, ostensibly, to prevent fraud, disfranchise legal voters without their own fault or negligence. The power of the Legislature in such cases is limited to laws regulating the enjoyment of the right, by facilitating its lawful exercise, and by preventing its abuse. The right to vote must not be impaired by the regulation. It must be regulation, not destruction."

I therefore, hold that Section 375 of the Compiled General Laws of Florida, 1927, should be carefully followed by all registration officers in registering persons who present themselves for registration, and that when any elector presents himself at the election precinct for the purpose of casting his ballot, he should be allowed to vote regardless of the fact that he is unable to comply with Section 1, Chapter 18407, Laws of Florida, Acts of 1937, in that he cannot sign an identification slip. The election officials can, of course, check this person's identification with the description as set forth on the registration books. This should be sufficient protection against any fraudulent attempt to vote by any person who is unable to write his name.

I doubt very seriously if the illustration you set forth will ever occur if the registration officers carefully follow paragraph 13 of Section 375 of the Compiled General Laws of 1927.

October 8, 1940—O-951.

ELECTIONS—REGISTRATION ONLY OF OFFICIAL EMPLOYEES
OF FEDERAL GOVERNMENT ARE WITHIN MEANING
OF CHAPTER 19333

Dear Sir:

In your letter of October 7, you propound the following question:

"Can the wife or other member of the family of a person holding an official position with the Government of the United States re-register under the provisions of Chapter 19333, Acts of 1939?"

In reply I wish to advise that Section 1 of said Act provides:

"Whenever any person holding an official position with the Government of the United States is, by reason of his or her duties incident to such position, required to be absent from the State of Florida during the whole of the period provided by law for the biennial registration of qualified electors to vote at primary elections as now or hereafter may be required by law, it shall be lawful for such elector, if retaining his qualifications to vote under his last prior registration, to make out and forward to the supervisor of registration for the county in which he is registered the following affidavit
* * *"

You will note that as to the person who comes within the meaning of said

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Act, there are two requisites: First that such person must hold an official position with the Government of the United States, and second that by reason of his or her duties incident to such position, he is required to be absent from the State of Florida during the whole of the period provided by law for the biennial registration.

A wife or a member of the family of such person who is permitted to register under the terms of said Act cannot possibly meet the two requisites I have set out above.

I therefore must answer your question in the negative.

October 19, 1940—O-960.

**VOTER MUST PLACE "X" BEFORE NAME OF CANDIDATE HE
HAS WRITTEN IN ON BALLOT WHEN VOTING
ON VOTING MACHINE**

Dear Sir:

I am in receipt of your letter of the eighteenth enclosing copy of letter from the County Attorney of Hillsborough County in which you ask my opinion as to whether or not it is necessary for a voter to mark X before the name of a candidate he has written in on the ballot in order to make the vote legal when the vote is written in on a voting machine.

When a voter votes for a candidate by writing his name on the ballot, he casts what is known as an irregular ballot. See Section 337 (18), C. G. L. Perm. Supp. which is as follows:

"Ballots voted for any person whose name does not appear on the machine as a qualified candidate for office, are herein referred to as irregular ballots. In voting for presidential electors, a voter may vote an irregular ticket made up of the names of persons in nomination by different parties, or partially of names of persons so in nomination and partially names of persons not in nomination, or wholly of names of persons not in nomination by any party. Such irregular ballot shall be deposited, written or affixed in or upon the receptacle or device provided on the machine for that purposes. An irregular ballot must be cast in its appropriate place on the machine, or it shall be void and not counted."

This section of the law contemplates that under certain conditions a person may be voted for whose name does not appear on the machine as a qualified candidate for office by writing in the name of such person. Section 337 (26), C. G. L. Perm. Supp., provides as follows:

"All laws relating to elections now in force in this State shall apply to all elections under this law so far as the same may be applicable thereto; and so far as such provisions are not inconsistent with the provisions of the law pertaining to the use of the paper ballot boxes."

The law governing the casting of such irregular ballots before the voting

ELECTIONS — In General

machine law became effective was Section 331, C. G. L., 1927, and as construed by the Supreme Court of the State of Florida in the case of *State ex rel. Nuccio v. Williams*, reported in 120 So. 310, requires an X mark to be placed before a name that is written on the ballot by a voter. The Court held that the writing of the name on the ballot without also placing an X mark before the name so written on the ballot does not constitute a vote for the person whose name is so written on the ballot and it is my opinion that since this was the law in effect at the time the voting-machine law went into effect that a voter must place an X mark before the name that is written on the ballot by a voter before the vote can be counted regardless of whether or not the vote is cast in a polling place where voting machines are used.

December 27, 1940—O-1016.

ELECTIONS—DEPUTY SHERIFFS—BY WHOM PAID

Dear Sir:

I have your letter of the 20th instant, relative to the above captioned matter, the body of which reads as follows:

"In quite a large number of counties the board of county commissioners is paying the fees for deputies at polling places as required by Section 339, Compiled General Laws, 1927, basing this payment on the fact that Section 362, Compiled General Laws, 1927, provides that the county commissioners should pay the expenses of holding primary elections.

"Under date of June 16, 1932 (1931-32 Biennial Report, page 528), former Attorney General Landis held that the commissioners should not pay these fees but that they should be paid by the sheriff.

"Inasmuch as a great many sheriffs do not earn the maximum compensation allowed by law, if they are required to pay election deputies it would mean that this expense would reduce the sheriff's compensation.

"In view of the foregoing facts, will you please reconsider the above mentioned opinion and advise?"

The letter from this office, under date of June 16, 1932, referred to in your communication, reads as follows:

"Replying to your favor of the 13th instant, permit me to say, in view of the provisions of Section 8195, Compiled General Laws, making it the duty of the sheriffs of the State to exercise vigilance in the detection of any violations of the Primary Election laws of this State, and in the apprehending of any violators thereof, it is my opinion that the county commissioners are not authorized to pay the Sheriff for providing a deputy at each polling place on Election Day.

"Section 339, Compiled General Laws, expressly requires the Sheriff to provide a deputy at each polling place. Therefore, it is his duty to do so,

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just as it would be his duty to provide deputies in any emergency to prevent violations of law. I think that where the Sheriff actually pays each deputy to serve at polling places on Election Day, he would be authorized to charge the amounts paid against the expense of his office."

It appears that certain other sections of the election laws should be considered in connection with the above sections.

Your attention is called to the primary election laws, Section 362, Compiled General Laws of Florida, 1927, reading as follows:

"The expenses of holding the primary elections herein provided for, including the expenses of preparing all ballots, blanks, and other supplies to be used at any primary election, and all expenses necessarily incurred in the preparation for or the conduct of such primary election, shall be paid out of the treasury of the county or the State, as the case may be, in the same manner, with like effect, and by the same officers as in the case of general elections."

I find no section of the General Election laws providing for the payment of General Election expenses other than Sections 306 and 311, Compiled General Laws of Florida, 1927. Section 306 provides that inspectors and clerks of any Special or General Election shall be paid for their services by their respective boards of county commissioners, which evidently means from the county treasury. Section 311 provides that counties shall pay for the printing and delivery of ballots and cards of instructions to voters.

Section 324, Compiled General Laws of Florida, 1927, provides that the county commissioners of each county shall provide booths or compartments, and Section 305, Compiled General Laws of Florida, Permanent Supplement, 1940 Parts, provides that the county commissioners in each county shall cause the names of inspectors and clerks of elections to be published in a newspaper published in the county if there be a newspaper printed in the county.

From the last four sections mentioned, it appears to be contemplated that the county shall pay all General Election expenses, including the per diem of deputy sheriffs serving at the polling places. This view seems to be supported by the language of Section 362, Compiled General Laws of Florida, 1927, above quoted, which provides that the expenses of holding primary elections shall be paid out of the treasury of the county, or the State, as the case may be, "in the same manner * * * as in the case of general elections." This language presupposes that all expenses of general elections shall be paid out of the treasury of the county, or the State, as the case may be.

In further support of the view that deputy sheriffs should be paid by the county for services at general election polling places, your attention is called to the provisions of the State Constitution relating to elections. Article III, Section 26, provides that laws shall be passed regulating elections and prohibiting under adequate penalties, all undue influence thereon from power, bribery, tumult or other improper practice. Article III, Section 27, provides

ELECTIONS — In General

for the election by the people or appointment by the Governor of all State and county officers. Article VI deals exclusively with suffrage and elections. It thus appears that elections are both authorized and required, and such requirement contemplates that the expenses of elections shall be paid.

An election is primarily a county function and not the function of the sheriff's office, or any other one officer.

After a careful consideration of the former opinion of this office, dated June 13, 1932, and the foregoing law, it is my opinion that deputy sheriffs serving at polling places in either a general or primary election should be paid from the treasuries of the respective counties. The former opinion, dated June 16, 1932, is, therefore, overruled.

SECTION 2

Elections — Primary

February 7, 1939—O-37.

ONLY METHOD OF CHOOSING DELEGATES TO
NATIONAL CONVENTIONS

Dear Sir: *

This will acknowledge receipt of your letter of February 4 wherein you state:

"Questions are arising on whether or not political parties within the meaning of our primary law may choose National Committeemen and National Committeewomen and delegates to the National Convention, in any other manner than in the primary elections. I have thus far advised that in view of Section 303 (359), Revised General Statutes it appears to me that the selection of the above named representatives of any recognized political party could be chosen only through the procedure of the Primary."

You ask my opinion upon the question submitted.

I find that the Legislature has very definitely settled this question. In 1937, Chapter 17897 was enacted. It amended Section 303 of the Revised General Statutes of 1920 (359, Compiled General Laws, 1927) as amended by Section 2 of Chapter 13761, Laws of Florida, Acts of 1929. This section now reads:

"A first Primary Election shall be held on the first Tuesday after the first Monday in May of every year in which a General Election is held for the election of all political party officers, *National Committeemen and Committeewomen, and delegates to National Conventions * * **" (Italics ours.)

This language is so clear it doesn't appear to me there can be any construction other than the one you have placed upon it. I, therefore, am of the opinion that no political party can choose National Committeemen and Committeewomen and delegates to a National Convention in any manner other than provided above, i. e., Primary Election.

February 9, 1940—O-728.

TAX COLLECTOR—FILING FEE REQUIRED OF NET INCOME

Dear Sir:

With your letter of the 9th instant you enclose copy of the letter from the Tax Collector of Monroe County, dated February 6, 1940, in which he states the total receipts for his office for the year 1939 were \$6,781.83, expenses \$2,498.04, making a net of \$4,283.79. He thereupon asked whether his filing fee as a candidate in the primary should be computed on the total receipts of the office or the net of \$4,283.79.

ELECTIONS — Primary

Section 385, Compiled General Laws, requires each candidate for nomination for an office to pay a filing fee, the amount of which is 3 per cent of the annual salary or compensation of the office sought by the candidate.

Section 2865, Compiled General Laws, provides that each county official whose compensation for his official duties is paid wholly or partly by fees or commissions or fees and commissions, shall receive as his yearly compensation for his official services all the net income from such office not to exceed \$5,000, 60 per cent of the next \$3,000 or any fraction thereof, 40 per cent of the next \$2,000 or any fraction thereof, and 25 per cent of the rest or residue thereof, provided that such official shall not receive more than \$7,500 per year.

Section 2666 defines net income to mean the residue of the income from such office after deducting all reasonable expenditures for the salaries of clerks and assistants, and the necessary expenditures for the proper operation of said office.

It is my opinion that the filing fee required of the Tax Collector of Monroe County is 3 per cent of the net income of his office for the year 1939 as above defined.

October 25, 1939—O-648.

PRIMARY ELECTION—METHOD OF SELECTING
NATIONAL COMMITTEEMEN

Dear Sir:

In reply to the inquiry as to whether a vacancy in the office of National Committeeman of a political party as defined by the statutes, occurring subsequent to the effective date of Chapter 19663, Acts of 1939, being House Bill No. 1182, must be filled by a primary election called by the executive committee of such political party.

It was suggested that such vacancy must be filled by a primary election under Section 4 of said Chapter 19663.

It is my opinion that a vacancy in the position of National Committeeman of a political party as defined by the statutes, occurring subsequent to the effective date of said Act of 1939, need not be filled by a primary election called by the executive committee of such political party, and that Section 4 of Chapter 19663, Acts of 1939, does not govern the mode of selection of National committeeman.

Said Section 4 of Chapter 19663 in terms refers only to a vacancy in "a State office" or a vacancy in "a county office." A member of a National Executive Committee of a political party is not a State or county officer, and before the enactment of said Section 4 of the Act of 1939, the selection of members of such committees was held to be governed by Section 28 of Chapter 6469, Acts of 1913, being Section 389, Compiled General Laws of

ELECTIONS — Primary

1927, that is, by resolution of the State Executive Committee of the political party concerned, for selection of members of such national committees in the primary elections, if so desired and declared by resolution of the State Executive Committee. State ex rel. West v. Gray, 124 Fla. 528, 169 So. 36; and State ex rel. West v. Gray, 124 Fla. 530, 169 So. 37.

Therefore, it is my opinion that a vacancy in the position of National Committeeman of a political party is to be filled at the option of the State Executive Committee in the manner authorized by Section 389, Compiled General Laws, 1927, the same as before adoption of said Act of 1939.

March 27, 1940—O-769.

BALLOTS—SECTION 321 C. G. L. AND SECTION 401 C. G. L.
 PRESCRIBE FORM OF BALLOT, AND DESIGNATION
 FOLLOWING NAMES OF CANDIDATES
 NOT AUTHORIZED

Dear Sir:

This will acknowledge receipt of your letter of today attaching thereto a sample ballot of another State showing the names of candidates for office with a line underneath each name showing whether the candidate has been endorsed by a group and whether the candidate favors some given person for President, and in some instances states apparently what the candidate stands for.

You state that you have been asked if the Florida ballot in our approaching primary could carry similar designations following the names of candidates appearing on the ballot. You request me to advise you:

"In view of Section 321 C. G. L. and Section 401 C. G. L. * * * if the Secretary of State should permit on the certificate sent out to the counties as a basis for printing the ballots designations as above mentioned following the names of the qualified candidates."

In reply I wish to advise that I have examined Section 321 C. G. L. and Section 401 C. G. L., and I find that the Legislature has been very specific as to the form of ballot to be used in our election. As a matter of fact, the Legislature has inserted in its various Acts relating to the form of ballot a sample ballot to be used and provided:

"Official ballots for primary elections shall be printed in substantially the following form." Section 401, C. G. L., 1927, Permanent Supplement, Volume I.

I, therefore, believe that any deviation from the official form of ballot set forth in said section would be wholly unwarranted and from an examination of the ballot that you have submitted, I do not believe same to be "substantially" the form provided by law.

I therefore am of the opinion that you should strictly follow in your

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certificate that you send out to the counties as a basis for printing the ballots, the official form as set forth in Section 401 that I have above quoted, and it would not be proper for our ballot to carry the designations following the names of candidates similar to the ones upon the ballot you submitted from another State.

April 15, 1940—O-783.

CAMPAIGN EXPENSE STATEMENTS—CANDIDATES FOR DELEGATES TO NATIONAL POLITICAL CONVENTIONS AND PARTY EXECUTIVE COMMITTEES REQUIRED TO FILE

Dear Sir:

This is in response to your letter of the 15th instant, requesting my opinion as to whether the provision of Section 421 of the Compiled General Laws of Florida, 1927, requiring each and every candidate for nomination in a primary to file a detailed itemized statement of his campaign expenses, is applicable to and binding upon candidates for delegates to national political conventions and for political party executive committeemen and committeewomen.

The requirement for filing campaign expense statements applies to "each and every candidate for nomination in a primary election * * * for any * * * office or position." Candidates for delegates to party conventions and for party executive committeemen are not as such candidates for office, but they are candidates for party positions and come within the purview of said Section 421 requiring detailed itemized statements of their campaign expenses, and failure to comply with that requirement subjects them to the same penalty as is in said Section imposed upon candidates for nomination to an office, to the extent of denying to them the right to have their names placed upon the ballot to be used in the primary election; and upon their failure to comply with the said requirement, it becomes the duty of the proper officers to certify that such candidates have failed to file such statement or statements, and thereupon their names shall not be placed upon the ballot to be used at such primary election.

This provision of the statute has apparently been considered and construed by the Supreme Court of Florida as being applicable to candidates for the positions of party executive committeemen and delegates to national political conventions, as evidenced by the expression of the Court found in *State ex rel. Landis v. Carson*, 114 Fla. 451, 154 So. 150, as follows:

"The provision of the statute forbidding commissions or certificates of election or of nomination to be given to those candidates who failed to file their expense statements, refers to nominations in the primary elections as to the election of party executive committees, delegates to national conventions, etc., in primary elections."

ELECTIONS — Primary

It is true that the quoted statement of the Court was dictum in the particular case, but the opinion was concurred in by all members of the Court, and I take it that it is a sufficient guide for administrative officers as to the proper construction to be placed upon the said statute in respect to its scope and application here under consideration.

In reaching the conclusion I have in this matter, I have not overlooked and am not unmindful of the opinions of my predecessors in office holding a contrary view but in view of the quoted expression of the Supreme Court and upon a very careful consideration and analysis of the statute involved and the reason back of it I feel it my duty to overrule all opinions of this office heretofore rendered holding a contrary view.

SECTION 3

Elections — Special

July 25, 1939—O-503.

NOT AUTHORIZED FOR PURPOSE OF REFERENDUM ON
COUNTY-WIDE FIRE CONTROL*Dear Sir:*

I am in receipt of your letter of the 21st, in which you inquire as follows:

"Please advise if, in your opinion, a special election could be called specifically for the purpose of a referendum on county-wide fire control under the provisions of Chapter 17024, Acts of 1935."

Section 11 of Chapter 17024, Laws of Florida, Acts of 1935, provides as follows:

"No Board of County Commissioners which is not now engaged in fire control work shall hereafter be authorized under the provisions of this Act to establish and/or maintain any fire control unit, unless and until the terms hereof shall be ratified by an affirmative vote of a majority of the qualified electors of such county voting in the election at which the question is submitted. The submission of said question to a vote of the electors *may be at any special or general election now provided for by law*, and the laws pertaining to and governing such special or general election shall govern the referendum election to be held on the establishment and/or maintenance of fire control units. The question or matter to be decided and determined by said electors at said election shall be stated upon the ballots used in said election as follows:

"For a County Fire Control Unit

"Against a County Fire Control Unit

"The result of such election shall be canvassed and returned as general elections for the election of county officers in said county are canvassed and returned, and the result thereof shall be certified to the Board of County Commissioners by the County Canvassing Board."

You will note that this section does not provide that an election may be called to submit the referendum question but states that it "*may be at any special or general election now provided by law.*" It seems to me that this law does not authorize the calling of a special election to submit only the question of a referendum on county-wide fire control but can be submitted only at some special or general election now provided for by law.

CHAPTER VI

INSURANCE AND SURETIES

January 19, 1939—O-8.

FLORIDA WORKMEN'S COMPENSATION ACT—SECTION 42(b)— CANCELLATION OF INSURANCE UPON REQUEST OF EMPLOYER

Gentlemen:

This is in reply to your letter of January 17. You call my attention to the provisions of Section 42 (b) of the Florida Workmen's Compensation Act, which reads as follows:

"No contract or policy of insurance issued by a carrier under this Act shall be cancelled prior to the date specified in such contract or policy for its expiration until at least thirty days have elapsed after a notice of cancellation has been sent to the Commission and to the employer in accordance with the provisions of subdivision (c) of Section 18."

You request my opinion as to whether or not, when the employer has surrendered his policy to the carrier and requested cancellation thereof, the carrier would be liable for a period of at least thirty days. In other words, could an employer procure the immediate cancellation of such a policy of insurance?

Section 42 (b) of the Act has a twofold purpose. In the first place, if the carrier desires to cancel the insurance the employer has thirty days in which to replace the coverage. Secondly, when a policy of insurance is cancelled the Florida Industrial Commission has sufficient notice to enable it to take such steps as may be necessary to enforce the provisions of the Florida Workmen's Compensation Act requiring employers to secure the payment of compensation. By reason of this second purpose hereinabove referred to it is essential that notice of cancellation be given to the Florida Industrial Commission when the employer desires to cancel the insurance.

It is my opinion that either the employer or carrier must give the thirty days notice to the Commission required by Section 42 (b) as a prerequisite to terminating liability under the insurance policy to employees. This view finds support in the decision of the Supreme Court of Indiana in the case of *American Employers Insurance Company v. Huffman*, 187 N. E. 410.

January 25, 1939—O-18.

WORKMEN'S COMPENSATION—APPLICATION OF REQUIRE- MENT OF INSURANCE CARRIER CONCERNING EXTENT OF COVERAGE

Dear Sir:

This is in reply to your letter of January 23 with enclosures.

INSURANCE AND SURETIES

From the file submitted and from our conferences on this matter I understand that the facts are substantially as follows: There is a rule followed by insurance companies writing Workmen's Compensation Insurance which reads as follows:

"Under no circumstances shall a policy be written to cover only a part of a specific location of a given risk, leaving another part of the same location uninsured. The entire operations of any one employer at a specific location shall be covered by a single policy. Policies shall be written upon the basis of the entire payroll for the operations of the employer which are the subject of insurance."

One M. S. Wiggins, of Seminole County, operates a vegetable packing house. On continuous premises adjacent to the packing house a partnership of which Mr. Wiggins is a member operates a celery farm. The two businesses are entirely separate from one another and there is no interchange of labor between them. It would further appear that Mr. Wiggins either has elected or intends to elect to bring the packing house under the provisions of the Workmen's Compensation Act in accordance with the waiver provided in Section 4 (b) of the Act. The insurance company contends that by reason of the rule hereinabove set forth insurance must be carried on the celery farm as well as the packing house if either is to be insured.

By reason of the authority vested in you under Section 38 of the Workmen's Compensation Act concerning insurance rates and classifications this matter was presented to you for determination. You request my opinion concerning the proper solution of the problem here presented.

To begin with, I might say that the rule followed by the insurance carrier is not unreasonable or improper. The rule is intended to eliminate confusion with regard to the extent of coverage under particular compensation policies. If a single employer were to hire two types of labor on the same premises, one exempt and the other non-exempt, there is a very great possibility that by reason of the confusion which must necessarily exist under such circumstances, the insurance carrier would be called upon to pay or at least defend against claims for which it received no premium and had not contracted to cover in its policy.

The difficulty here is not with the rule but with the enforcement of the rule. Assuming the facts hereinabove stated to be true, the reason for the rule here considered would not apply. It is therefore my opinion, predicated upon a state of facts in which it is shown that the two types of businesses involved are entirely separate and distinct and there could be no practical problem from confusion, that the rule of the insurance carrier hereinabove referred to should not be applied. To so apply it would violate Sub-section 4 of Section 36 of the Workmen's Compensation Act prohibiting a rating organization or insurer from charging any rate which discriminates unfairly between risks within this State of essentially the same hazards.

INSURANCE AND SURETIES

March 18, 1939—O-117.

BENEVOLENT MUTUAL BENEFIT ASSOCIATIONS—CHAPTER
15886, ACTS OF 1933, AS AMENDED BY CHAPTER
16802, ACTS OF 1935*Dear Sir:*

This is in reply to your letter of March 16.

You call my attention to a particular company organized under Chapter 15885, Laws of Florida, Acts of 1933, as amended by Chapter 16802, Laws of Florida, Acts of 1935. It would appear that this particular company is one which had been in operation prior to the enactment of the above statutes and which had reorganized under the provisions of same. Certain policies have been issued by this company, designated by the letters "S. L." replacing certain certificates issued to the same individuals prior to the re-incorporation of the company as aforesaid. For some months the company has been levying special assessments against the holders of said "S. L." certificates which have not been levied against holders of other certificates. The company now proposes to increase the regular monthly assessments against the holders of the "S. L." certificates to an amount greater than the \$1.25 per month stated in the certificates. Such certificates, however, contain the following provision:

"It is understood and agreed that the assessment rates under this certificate are not based upon calculations from any mortality table with assumed rate of interest, and that they may be increased if necessary to comply with the provisions of this certificate and in accordance with the laws under which it is issued."

You request my opinion concerning the following specific questions:

1. Does the company have the legal right to raise the assessment rate as hereinabove proposed?
2. Does a company organized under the laws hereinabove referred to have the legal right to levy special assessments against one group or class of certificates which are not levied against other groups or classes?
3. Does the authority given you as Insurance Commissioner to approve or disapprove membership certificates issued by companies operating under the laws hereinabove referred to give you the right to disapprove a proposed policy, if it appears to you that the minimum amounts undertaken to be paid by the company under certain circumstances are unreasonably small?

Answering your first question, it is my opinion that the association does have the legal right to raise its assessment rate. The assessment of \$1.25 named in the policy is, in the final analysis, only the estimated contribution which each policy-holder has to make to a fund out of which claims and administration expenses are to be paid. The statutes above referred to, under which the company has been organized, contemplate the payment of benefits from the proceeds of specific assessments. In fact such payment of benefits

INSURANCE AND SURETIES

is specifically contingent upon the collection by the company of specific assessments, and may be limited to the amount collected. When experience discloses that the assessment rate is inadequate, and when the right to increase the rates is specifically stated in the insurance contracts of the company, such rates may be increased. In fairness to the policy-holder it is preferable to have the rate increased than to resort to the practice of levying frequent special assessments.

Answering your second question, it is my opinion that the legality of levying special assessments against one class of certificates which are not levied against other classes, depends upon the particular plan of operation in effect. If a particular company is operating in accordance with a plan which contemplates the division of policy-holders into definite groups in line with some reasonable system of classification, then assessments against members of each group can be made independently of the other groups. Such a plan of operation should be incorporated in the charter of the company filed with the Secretary of State under Section 2 of Chapter 15885, Acts of 1933, as amended by Section 1 of Chapter 16802, Acts of 1935. Issuance of contracts in accordance with such a plan would be subject to your approval as State Treasurer and Insurance Commissioner and you would have authority to require this plan to be disclosed in the particular contracts. Unless the plan of operation contemplates the division of the membership into classes it would seem to follow that the entire membership constitutes one class and that assessments should be made against all the members of that class in accordance with some uniform system.

Answering your third question, it is my opinion that you as State Treasurer and Insurance Commissioner do not have the legal authority to disapprove a proposed policy on the grounds that it appears to you that the minimum amounts undertaken to be paid by the company under certain circumstances are unreasonably small. Your authority in this regard is derived from the following statutory language contained in Section 4 of Chapter 15885, Acts of 1933:

"Upon receipt by the State Treasurer of a certificate from the Secretary of State that the organization has been duly incorporated under the terms of this Act, he shall cause such organization to submit to him for his consideration a copy of all contracts for benefits and the application for membership and all endorsements, riders and waivers which the Association proposes to use; and it shall be his duty to approve the same if found to be clear and definite in form and content, to the end that the proposed assured shall be fully and clearly advised as to the extent and nature of the obligation assumed by the Association and as to the rights and remedies of the assured, and to disapprove all such forms as may be submitted that do not definitely and clearly cover the purpose for which the organization is incorporated in compliance with this Act, or the true meaning and intent of which is ambiguous, involved or obscure."

INSURANCE AND SURETIES

You do have the right, however, to require the particular policies to clearly point out what amounts, in cash, are payable under the particular circumstances considered in the policy.

March 28, 1939—O-128.

**DISCRIMINATION BETWEEN NON-RESIDENTS AND RESIDENTS
UNDER SECTION 6199, COMPILED GENERAL LAWS**

Dear Sir:

This is in reply to your letter of March 21.

You call my attention to the case of *State ex rel. Hoadley v. State Board of Insurance Commissioners*, reported in 37 Florida Reports, page 564, 20 Southern Reporter, page 772.

In this case the Supreme Court of Florida declared the provisions of the Insurance Laws requiring individuals and unincorporated associations of other States to have more assets than residents of this State in order to qualify for engaging in the business of insurance to be invalid. The Supreme Court predicated its decision on Section 2 of Article IV of the United States Constitution which places the citizens of each State upon the same footing with citizens of other States so far as advantages resulting from such citizenship are concerned. This Constitutional provision inhibits discriminating legislation by one State against citizens of another.

You request my opinion as to two matters concerning this decision; one, whether there has been any subsequent decision of the Supreme Court overruling or modifying the decision above referred to; and two, whether any subsequent amendment to the statute upon which the decision was predicated would have any material effect upon the question involved in the case.

Answering your first question, there has not been any such subsequent decision. Answering your second question, the subsequent amendments to the statute do not have the effect of eliminating the objection pointed out by the Supreme Court.

The present statute, Section 6199, Compiled General Laws (4249 Revised General Statutes) contains essentially the same discriminatory provision in that it requires associations, firms or individuals not of this State, to be possessed of at least \$250,000 in certain described assets, while associations, firms or individuals of this State are required to possess assets in the amount of only \$100,000, in order to obtain a certificate to engage in the business of insurance in this State.

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April 11, 1939—O-143.

GUARANTY TO RECOVER GOODS, ETC., OR THE VALUE
THEREOF IN EVENT OF LOSS BY ROBBERY
AS CONSTITUTING INSURANCE*Dear Sir:*

You submit for my consideration a form of certificate issued by National Protective Association, Inc. You request my opinion as to whether this certificate constitutes an insurance agreement so as to bring it within the purview of statutes relating to the regulation of the business of insurance.

The certificate states, in substance, that in consideration of the payment of a certain fee the company agrees to guard and protect the premises described for a period of one year from robbery and/or burglary and further that the company "hereby guarantees to recover goods, wares, merchandise and/or monies or the value thereof up to the amount of Five Hundred Dollars (\$500.00), within sixty days in the event same are lost by a Robbery or Burglary of the said premises * * *."

From the language of the certificate hereinabove set forth it would appear that the question here involved depends upon whether the certificate constitutes a contract of *guaranty* or one of *indemnity*. If it is a contract of indemnity it constitutes insurance and would come within the regulatory jurisdiction of your department. The following are definitions of insurance approved by the Supreme Court of Florida in the case of *State ex rel. Landis v. DeWitt C. Jones Co.*, 147 So. 230, text pages 231-232:

"Bouvier's Law Dictionary, p. 1008, under the heading of 'Insurance,' defines an 'insurance contract' to be one 'whereby, for an agreed premium, one party undertakes to compensate the other for loss on a specified subject, by specific perils.'

"In *Commonwealth v. Beneficial Ass'n.*, 137 Pa. 412, 18 A. 1112, it is said:

"'A contract of insurance is purely a business adventure, not founded on any philanthropic * * * or charitable principle; and the design and purpose of an insurance company, and the dominant and characteristic feature of its contract, is the granting of an indemnity, or security against loss, for a stipulated consideration.'"

Although the word "guarantees" appears in the certificate, the contract is not actually one of guaranty. The distinction between a contract of guaranty and one of indemnity is set forth in 12 R. C. L., page 1058, as follows:

"There is an important difference between a contract of guaranty and one of indemnity. *The former is a collateral undertaking and presupposes some contract or transaction to which it is collateral*, while the latter is essentially an original contract. If one indemnifies another from loss from the acts of

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a third party, though there is privity between the parties to the indemnity, there may be no privity or obligation as between the parties to the indemnity and such third party: *but in the contract of guaranty it is essential that there be two different contracts, and hence there is always privity of contract between the principal debtor and the creditor.* An obligation may constitute both a guaranty and an indemnity." (Italics ours.)

It is clear from an analysis of the contract that it is essentially one of indemnity and not guaranty. It is clear that the contracting parties would assume, from reading the certificate, that the company would be obligated to pay the value of the goods or other things of value lost in a robbery or burglary in the event that they were not recovered within sixty days. The word "Guarantee," given a broad interpretation, may be employed in a contract of indemnity, as would appear to be the situation in the following definition of "insurance" appearing in *Words & Phrases, Third Series, Volume 4*, page 351:

"'Insurance' is an undertaking for a consideration comparatively small to guarantee the insured against loss from certain risks, specified in the contract, which risks are in the future and not in the past except in some cases of marine insurance where the loss may be past, but unknown to the parties. *People ex rel. Daily Credit Service Corporation v. May*, 147 N. Y. S. 487, 489, 162 App. Div. 215."

It is my opinion that the certificate submitted by you, in its present form, constitutes a contract of insurance which could only be properly issued by one duly qualified under the insurance laws of the State.

April 12, 1939—O-155.

CHAPTER 17069, ACTS OF 1935, NOT APPLICABLE TO AGENTS OF INTER-INSURANCE EXCHANGES

Dear Sir:

You request my opinion as to whether or not the provisions of Chapter 13663, Laws of Florida, Acts of 1929, as amended by Chapter 14741, Acts of 1931 and further amended by Chapter 17069, Acts of 1935, apply to agents of inter-insurance exchanges. The statutory provisions above referred to are generally known as the Insurance Agents' Qualification Law. Briefly stated, such statutory provisions outline the procedure and requirements for licensing insurance agents and solicitors.

The statutes relating to inter-insurance exchanges are included in the Compiled General Laws of Florida as Sections 6249 to 6259, inclusive, and Section 6258, Compiled General Laws, Supplement. This type of insurance is there considered as "reciprocal insurance." The pertinent provisions for consideration in connection with the question here involved are set forth in Section 6259, Compiled General Laws, which reads as follows:

"Except as herein provided no law of this State relating to insurance

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shall apply to the exchange of such indemnity contracts *unless they are specifically mentioned.*" (Italics ours.)

In the words which we have hereinabove italicized the Legislature has itself prescribed the rule of construction by which it may be determined whether the laws relating to insurance shall apply to the exchange of indemnity contracts. In other words, the Legislature has itself declared that no other law shall be construed to apply to the exchange of such indemnity contracts unless it is specifically mentioned in the law. The following is the twenty-second headnote in the case of *State v. Burr*, 84 So. 61:

"Where a rule of construction is contained in the status itself, that rule should be applied if it is necessary to use any rules of construction in determining the meaning or effect of the law."

In view of the fact that the Insurance Agents' Qualification Law, as embodied in the statutes first hereinabove referred to, does not specifically mention the exchange of indemnity contracts as defined by the statutes relating to reciprocal insurance, it is my opinion that such statutes are not applicable to reciprocal insurance. In the case of *Casualty Reciprocal Exchange v. Bounds* (Ark.), 88 S. W. (2d) 836, the statute under consideration did not contain the words "unless they are specifically mentioned." For that reason it involved an essentially different question of law.

August 4, 1939—O-509.

INSURANCE COMMISSIONER HAS NO AUTHORITY TO
REGULATE RATES UNDER FEDERAL WORK-
MEN'S COMPENSATION ACT

Dear Sir:

This is in reply to your letter of August 3.

You state that a question has been raised concerning your authority as Insurance Commissioner of Florida to regulate premium rates on compensation classifications which involve coverage under the Federal Longshoremen's and Harborworkers' Compensation Act and the Florida Workmen's Compensation Act. You request my opinion as to whether you have authority to regulate premium rates over that portion of a classification involving the Federal coverage.

Your authority to regulate and prescribe insurance rates is derived from the Florida Workmen's Compensation Act and more particularly from Section 38 thereof. In the absence of provisions to the contrary, your authority is limited to the scope of the Act in which it is created—the Florida Workmen's Compensation Act. It would therefore follow that you have no authority, under the Florida Workmen's Compensation Act, to regulate insurance rates under the Federal statute, which is completely independent of the Florida law.

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September 29, 1939—O-589.

HOSPITAL SERVICE PLANS—APPLICABILITY OF CHAPTER
19108, ACTS OF 1939, PROVIDING FOR LICENSING
THE OPERATION*Dear Sir:*

You call my attention to Chapter 19108, Laws of Florida, Acts of 1939, which is an Act applicable to counties having a population of not less than 85,000 and not more than 165,000, according to the last State or Federal census. This Act authorizes you, as Insurance Commissioner, to license non-profit corporations to enter into contracts for the rendering of hospital service to any of their subscribers with certain classes of hospitals described in the Act.

You state that the population limits contained in the Act make it applicable at the present time only to Hillsborough County. You request my opinion in particular as to whether corporations licensed under this Act may issue certificates to individuals residing outside of a county coming within the classifications set forth in the statute.

Assuming, for the purpose of this opinion, the constitutionality of the classification of counties contained in the Act, it is quite apparent that this Act can be effective only in counties included within such classification. Until the 1940 Federal census, at least, Hillsborough County is the only county to which the Act is now applicable. This means that corporations licensed under this Act can exercise the authority given them under such licenses only in Hillsborough County. The hospital service can be furnished only in Hillsborough County and the agents of the corporations must confine their activities, in soliciting members, to Hillsborough County. This does not mean, however, that a person residing outside of Hillsborough County may not go there, take out a membership, and receive hospitalization under his contract in Hillsborough County.

Answering your further question, I do not believe that the enactment of this statute has any effect on similar plans now being operated in other counties without obtaining a license or permit from the Insurance Commissioner.

October 11, 1940—O-953.

WORKMEN'S COMPENSATION INSURANCE—DISCRIMINATION—
ISSUANCE OF PARTICIPATING AND NON-PARTICIPAT-
ING POLICIES BY INSURANCE COMPANIES*Dear Sir:*

You request my opinion as to whether an insurance carrier authorized to write Workmen's Compensation Insurance in Florida, which issues participating policies, is required to offer such policies to all of its clients, or whether

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such carrier may restrict these policies to those who, in the discretion of the carrier, should be offered this plan. You state that the same rates are charged in both participating and non-participating policies, and that the dividend on a participating policy is determined after expiration of the policy.

I call your attention to Section 38 (d) 4 of the Workmen's Compensation Act, which reads as follows:

"No such rating organization, or insurer authorized to transact the afore-said class of insurance within this State, shall fix or make any rates or schedule of rates or charge a rate which discriminates *unfairly* between such risks within this State of essentially the same hazards. Whenever it is made to appear to the satisfaction of the Commissioner of Insurance that such discrimination exists, he may, after a full hearing before himself or before any salaried employee of his department, whose reports he may adopt, order such discrimination removed." (Italics ours.)

The statutory provisions above set forth prohibit *unfair* discrimination. While it would seem that the practice concerning which you inquire would be unfair discrimination, nevertheless, whether or not it is such is a question of fact to be determined by you after a full hearing in accordance with law.

October 31, 1939—O-622.

RIGHT OF STOCK COMPANIES, MUTUALS OR RECIPROCAL
TO ISSUE PARTICIPATING POLICIES

Dear Sir:

This is in reply to your letter of October 24, in which you request my opinion as to whether there is any statute in Florida preventing the issuance of participating policies by stock companies, mutuals or reciprocals.

A "participating policy" has been judicially defined as follows:

"A 'participating policy' is one that is entitled to dividends, whether such dividends be paid yearly or at stated distribution periods. *National Protective Legion v. O'Brien*, 112 N. W. 1050, 1052, 102 Minn. 15 (quoting and adopting *Johnson's Definitions of Life Insurance*)."
Words and Phrases, Second Series, Vol. 3, page 878.

I find no statute of Florida prohibiting the issuance of such policies by stock companies, mutual insurance companies, or reciprocals.

November 1, 1939—O-632.

CHILDREN UNDER SIXTEEN YEARS OF AGE ELIGIBLE FOR
MEMBERSHIP IN FRATERNAL BENEFIT SOCIETY

Dear Sir:

This is in reply to your letter of October 30 enclosing copy of a letter addressed to you from Mr. Edwin R. Bentley of Lakeland. You request my

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opinion as to whether under the provisions of Chapter 17947, Acts of 1937, children under the age of sixteen years may be members of fraternal benefit societies.

A determination of this question is involved in the proposed issuance to such children under the age of sixteen years of contingent endowment policies authorized by said Act, in view of the fact that such contingent endowment policies may be issued only to "members."

In the opinion of the late Attorney General Cary D. Landis under date of July 17, 1937, reported at pages 157 of the Biennial Report of the Attorney General for the years 1937-38, the following statement is to be found:

"In my opinion Chapter 17947 abolishes restrictions as to the ages of members to whom certificates may be issued. As hereinabove stated, Section 4441, Revised General Statutes of Florida, 1920, as amended by Chapter 17947 stands in the place of the original Section 4441."

It is my opinion that children under the age of sixteen years must be classified as "members," even though their privileges as such members are restricted by the said statute so as to prevent them from having a voice or vote in the management of the society.

December 2, 1939—O-670.

WORKMEN'S COMPENSATION—STATE EMPLOYEES—FUND CANNOT BE MAINTAINED IN STATE TREASURY TO PAY THEIR CLAIMS

Dear Sir:

This will acknowledge receipt of your letter of recent date requesting my opinion as to "whether or not the Comptroller would have authority to issue warrant as above stated and create two funds in the State Treasury to be known as the 'Workmen's Compensation Insurance Fund—Florida State Hospital' and the 'Workmen's Compensation Fund—Florida State Prison Farm' and upon receipt of legally approved claims against said funds to draw warrant in payment of same."

In reply I wish to advise that I was a member of the Committee selected by the Board of Commissioners of State Institutions to determine the mechanics of setting up a fund out of which workmen's compensation claims could be paid, it being the idea to set up a fund similar to the State Fire Insurance Fund.

The State Fire Insurance Fund was set up under specific statutory authority, and as to whether or not we can create the workmen's compensation fund likewise depends upon our statutes.

An examination of the Workmen's Compensation Act discloses several applicable provisions relating to coverage by the State of Florida of its employees and the manner in which they can enforce their claims.

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Section 2 of Chapter 17481, Acts of 1935, provides that

"The term 'employment' includes employment by the State and all political subdivisions thereof * * *."

Paragraph (3) of the same Section provides:

"The term 'employer' means the State and all political subdivisions thereof * * *."

Under Section 38 of said Act, Paragraph (e), it is provided:

"The State, its Boards, Bureaus, Departments and agencies and all its Political Subdivisions who employ labor shall be deemed self-insurers under the terms of this Act unless they elect to procure and maintain insurance to secure the benefits of this Act to their employees and *they are hereby authorized to pay the premium for the said insurance.*"

This Act was amended by Chapter 18413, Acts of 1937, Section 19 thereof provides for proceedings against the State in the following manner:

"Any person entitled to compensation benefits by reason of the injury or death of an employee of the State of Florida, its boards, bureaus, departments, agencies or subdivisions employing labor, may maintain proceedings and actions at law against the State, its boards, bureaus, departments, agencies, and subdivisions, for such benefit, said proceedings and actions at law to be in the same manner as provided herein with respect to other employers."

The Board of Commissioners of State Institutions felt that in view of the fact that there was authority for the State to become self-insurer that the amount that was usually paid by the State institutions involving to-wit, the Florida State Prison Farm and the Florida State Hospital at Chattahoochee, could be paid into a special fund to be held in the State Treasury, earmarked solely for the payment of claims that might be made under the Workmen's Compensation Act, and my first impression was that this could be done and that an appropriation might be implied from the fact that the Legislature had authorized a suit against the State. However, I find that the general rule is that "Judgments against a State, in cases where it has consented to be sued, generally operate merely to liquidate and establish plaintiff's claim; in the absence of express provision otherwise, they cannot be enforced by ordinary processes of law; and it is for the Legislature to provide for their payment in such manner as it sees fit." 59 C. J., STATES, 501.

The leading case seems to be that of *Carter v. State* (La.), 8 So. 836, where the Court said:

"A statute authorizing a suit against the State does not authorize the issuance of a writ of execution."

I also find practically the same statement in 25 R. C. L. States, 55; however, with this statement added:

"Though the liability of the State has been judicially ascertained, the

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State is at liberty to determine for itself whether to pay the judgment or not, and execution cannot issue on a judgment against the State."

I, therefore, do not believe that it would be proper to say that the Legislature had done any more with regard to the payment of a judgment than to merely authorize a claimant to have the amount of his claim judicially ascertained, and that it would take an additional Act by the Legislature making a specific appropriation before any money could be paid out of the State Treasury on this judgment, as I do not believe that it can be said that this meets the requirement of Section 4 of Article IX of our Constitution which provides:

"No money shall be drawn from the Treasury except in pursuance of appropriations made by law."

I find that the Budget Commission recommended to the Legislature, for necessary and regular expenses of the Florida State Hospital, the sum of \$2,500.00 for the payment of premium on Workman's Compensation Insurance, and that the Legislature followed the recommendation of the Budget Commission and appropriated the full amount requested, which as I have said contained an item of \$2,500.00 for premium on Workman's Compensation Insurance.

I find that the Budget Commission recommended for the Florida State Prison Farm, the sum of \$11,920.09 to cover administration, traveling, telephone, telegraph, office supplies, postage, stationery, freight, express, and insurance, and the Legislature followed the recommendation of the Budget Commission and appropriated the full sum of \$11,920.09.

It is, therefore, apparent that the Legislature has not only authorized the payment of a premium for Workman's Compensation Insurance for the two Institutions mentioned by the provisions of the Workmen's Compensation Act that I have above quoted, but that the Legislature has gone even further and has made a direct appropriation to insure the payment of claims promptly as they become due and payable, rather than to have the claimant wait until he can obtain the passage of another Act of the Legislature specifically appropriating an amount sufficient to pay his claim.

I am of the opinion that this is in effect, a declaration of policy by the Legislature that should be pursued by the Board of Commissioners of State Institutions until the Legislature changes the law, and that it would be proper to establish in the State Treasury a Workmen's Compensation Insurance Fund for the Florida State Hospital and the Florida State Prison Farm.

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January 29, 1940—O-710.

**FIREMEN'S RELIEF AND PENSION FUND—EXCHANGES
OPERATING UNDER RECIPROCAL INSURANCE LAW
SUBJECT TO TAX WHICH MAY BE DE-
DUCTED FROM STATE TAX***Dear Sir:*

This is in reply to your letter of January 12, in which you request my opinion as to whether municipal ordinances authorized under Section 5 of Chapter 10112, Laws of Florida, Acts of 1939, providing for Firemen's Relief and Pension Fund, apply to exchanges operating under the law governing reciprocal insurance.

Section 5 of Chapter 19112 authorizes each incorporated city or town classified in Section 1 of that Act to " * * * assess and impose, on every insurance company, corporation, or *other insurer* now engaged in or carrying on or who shall hereafter engage in or carry on the business of insurance against loss or damage by fire or tornado, an excise or license tax. * * * " It is further provided that such insurance company, corporation, or other insurer shall receive credit for the tax paid on the amount payable to the State of Florida for the similar State excise tax imposed by other provisions of the laws of Florida.

While an exchange operating under the law governing reciprocal insurance would not be either an insurance company or corporation, it would come within the terms "other insurer" contained in Section 5 of Chapter 19112. Since said Chapter 19112 relates primarily to the creation of a Firemen's Relief and Pension Fund and only incidentally to insurance, by authorizing an excise tax upon insurers, Section 4290, Revised General Statutes (Section 3259 Compiled General Laws), would not prevent the levy of such an excise tax upon exchanges operating under the law governing reciprocal insurance.

It is, therefore, my opinion that said Section 5 gives authority to municipalities described in the statute to levy a tax on such exchanges operating under the law governing reciprocal insurance and that the tax, when paid, may be deducted from the gross receipts tax imposed on such exchanges by Section 4298, Revised General Statutes, as amended (Section 6258, Compiled General Laws, permanent supplement).

January 30, 1940—O-713.

**MUTUAL INDEMNITY PLAN FOR HIGH SCHOOL ATHLETES
CONSTITUTES INSURANCE***Dear Sir:*

You submit for my consideration an original letter to you from the Florida High School Athletic Association, with enclosures relative to a pro-

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posed Florida High School Athletic Association athletic accident benefit plan. You request my opinion as to whether or not the proposed plan would violate the insurance laws of Florida.

Under the proposed plan, fees are paid on account of each person participating in various fields of athletics. For instance, a fee of \$1.00 per boy is paid for football, 50 cents per person for basketball, et cetera. The proposed plan itemizes various injuries for which payment will be made for medical and dental services. The amounts specified are maximum amounts and payment in full is contingent upon there being available a sufficient amount of money to pay all claims in full. If there is not such an amount available, claims are paid on a pro-rated basis.

While it is contemplated that this is to be strictly a non-profit mutual assistance plan, and that its purpose is to enable injured high school athletes to receive immediate attention even though the parents of such athletes may not be in a financial position to engage the services of a physician, the proposed plan is essentially one which constitutes insurance. As such, it can only be put in operation in compliance with the insurance laws of Florida.

March 5, 1940—O-748.

SICK AND FUNERAL BENEFIT COMPANIES—EFFECT OF CHAPTER 19306, ACTS OF 1939, ON REQUIRED RESERVE

Dear Sir:

You call my attention to particular sections of the statutes relating to sick and funeral benefit companies.

Section 2 of Chapter 9149, Acts of 1923 (Section 6263, C. G. L.), requires such companies to deposit with the State Treasurer \$5,000.00 in cash for bonds. Section 3 of Chapter 9140, as amended by Section 1 of Chapter 10152, Acts of 1925 (Section 6264, C. G. L.), requires such companies to set aside for the protection of policy holders an amount not less than 3 per cent of the gross collections from policy holders during the current year. This section requires that such companies shall maintain with the State Treasurer an amount equal to the reserve as therein provided and not less than the \$5,000 required to be deposited as hereinabove set forth.

Chapter 19306, Laws of Florida, Acts of 1939, requires sick and funeral benefit companies to set aside and maintain for the protection of policies issued after the passage of that Act the same reserve required of life insurance companies for the protection of similar policies. The Act further provides that such companies shall set aside and maintain a reserve at the rate of not less than 20 per cent per year on all outstanding policies until the full reserve is set aside on such outstanding policies. Section 2 of Chapter 19306 repeals all laws in conflict with said statute.

It is my opinion that the provisions of Section 3 of Chapter 9149, Acts of 1923, as amended by Section 1 of Chapter 10152, Acts of 1925 (Section 6264

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C. G. L.) relating to the setting aside and maintenance of reserves by sick and funeral benefit companies, are superseded by the provisions relating to the same subject contained in Chapter 19306, Acts of 1939. It would therefore not be necessary for a sick and funeral benefit company to maintain with the State Treasurer a deposit in excess of the initial deposit of \$5,000.00 to which reference has hereinabove been made.

March 23, 1940—O-765.

**SALE OF STOCK OF INSURANCE COMPANY—CONSTRUCTION
OF STATUTE**

Dear Sir:

This is in reply to your letter of March 15, in which you request my opinion as to whether Section 5743, Revised General Statutes (Section 7970, Compiled General Laws) prohibits an officer of an insurance company from selling stock in that company and receiving a commission of 10 per cent for so doing.

Section 5743, Revised General Statutes (Section 7970 C. G. L.) reads as follows:

"No officer, agent or other person selling, or negotiating stock in any insurance company in this State shall receive either directly or indirectly more than ten per cent. of the sales of any of said stock. No president, vice-president, secretary, treasurer, or director or any other executive officer of any insurance company shall participate in the commissions received by any person selling, negotiating the sale of any stock of any insurance companies either directly or indirectly; and any person violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction be fined not less than one hundred dollars nor more than five hundred dollars, or in the discretion of the court to imprisonment in the county jail (Ch. 7297, Acts of 1917, Secs. 1, 2.)"

It is my opinion that the statutory provisions above set forth were intended to deal with two separate factual situations: The first, limiting the commission to be paid in connection with sale of stock in an insurance company to 10 per cent of the sale price, and second, prohibiting an officer of the company to participate in commissions on the sale of such stock when the sale is made by another person.

It is, therefore, my opinion that the above statutory provisions do not prohibit an officer of the insurance company from selling stock in the company and receiving a commission of 10 per cent on same, although such an officer would be prohibited from participating in the commission paid to any other person on the sale of such stock.

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May 14, 1940—O-806.

**ENDORSEMENT ON POLICY OF INDEMNITY INSURANCE PRE-
SCRIBED BY INTERSTATE COMMERCE COMMISSION
DOES NOT CONVERT POLICY INTO
CONTRACT ON SURETYSHIP***Dear Sir:*

You have submitted for my consideration your file of correspondence with Mr. W. Y. Blanning, Director, Interstate Commerce Commission, Bureau of Motor Carriers. Included in this file is a printed form of endorsement prescribed by the Interstate Commerce Commission to be included in policies of public liability insurance required of motor carriers for the protection of the public, pursuant to Section 215 of the Motor Carrier Act of 1935 (Section 315, Title 49, U. S. C. A.)

You request my opinion as to whether this endorsement transforms a policy of indemnity insurance into a contract of suretyship, so as to require the insurance company issuing the insurance policy, with endorsement, to qualify under the laws of Florida, as a surety company, and deposit with the State Treasurer securities of the value of \$75,000.00 in accordance with Section 4339, Revised General Statutes (Section 6302, Compiled General Laws). This question arises by virtue of the following endorsement appearing on the certificate of authority of the insurance company issuing the policy, with the endorsement required by the Interstate Commerce Commission:

"This certificate does not authorize the issuance of fidelity or surety bonds, or public liability policies under Chapter 14764, Laws of Florida, Acts of 1931, or public liability policies creating a liability to third persons or constituting a cause of action upon which a third person could maintain a suit against the insurer."

In other words, can an insurance company whose certificate of authority is limited by the provisions above set forth, lawfully issue the usual form of indemnity insurance with the endorsement prescribed by the Interstate Commerce Commission?

In the case of *State ex rel. Travellers Indemnity Company v. Knott*, 153 So. 304, the Supreme Court of Florida ruled that the usual form of public liability insurance policy is a contract of indemnity and not suretyship, and that an insurance company does not have to qualify as a surety company in order to issue such policies. That case was distinguished from the case of *State ex rel. Union Indemnity Co. v. Knott*, 143 So. 221 and 143 So. 296, in which the particular insurance policies involved were written for motor carriers licensed under Chapter 14764, Laws of Florida, Acts of 1931. Under the provisions of that Act, the insurance company was liable directly to persons injured by reason of negligent operation of motor carriers. The provisions of the Act became a part of the policy of insurance and made it a contract of

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suretyship rather than one of indemnity. The following statement from the opinion of the Supreme Court of Florida, in the case of Royal Indemnity Co. v. Knott, 136 So. 474, illustrates the distinction between a contract of indemnity and one of suretyship:

"(10) The essential distinction between an indemnity contract and a contract of guaranty or suretyship is that the promisor in an indemnity contract undertakes to protect the promisee against loss or damage through a liability on the part of latter to a third person, while the undertaking of a guarantor or surety is to protect the promisee against loss or damage through the failure of a third person to carry out this obligation to the promisee. 16 A. & E. Ency. Law (2d Ed.) 168."

It is my opinion that the proposed endorsement does not result in creating a direct primary liability on the part of the insurance company to persons injured by the negligence of the insured carrier. The contract, therefore, would remain one of indemnity and the company would be authorized to write such a policy, with endorsement, without qualifying as a surety company.

I call your attention, however, to the fact that this ruling would not apply when a motor carrier is required to comply with the provisions of Chapter 14764 Laws of Florida Acts of 1931 in addition to the provisions of the Federal Motor Carrier Act. Compliance with the State statute would, by operation of the law, necessarily require the policy to be written by a company qualified as a surety company.

- August 23, 1940—O-900.

BENEVOLENT MUTUAL BENEFIT ASSOCIATIONS— DEPOSIT REQUIRED

Dear Sir:

This is in reply to your letter of August 22.

You call my attention to Section 5 of Chapter 15885, Laws of Florida, Acts of 1935, as amended by Section 1 of Chapter 19121, Laws of Florida, Acts of 1939. Under the statutory provisions there set forth, benevolent mutual benefit associations organized under Chapter 15885, Acts of 1933, as amended, are required to deposit with the State Treasurer for the benefit of policy holders in said association cash, or United States bonds, or bonds of any county or municipality, in the sum of \$5,000 market value. The pertinent provisions of said Section 5, as amended, read as follows:

"All associations authorized to operate and do business under the provisions of this Act shall deposit with the State Treasurer in cash, United States bonds, or bonds of any county or any municipality of the State, to be approved by the State Treasurer, in the sum of Five Thousand (\$5,000.00) Dollars, market value, *Twenty-five Hundred (\$2,500.00) Dollars of which shall be deposited upon the issuance of the permit and the balance in the next succeeding twelve equal monthly payments.*" (Italics ours.)

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You also call my attention to Section 4 of Chapter 15885, which said section has the sub-title "Issuance of Permits to Solicit Applications." Two forms of "permits" are referred to in said Section 4. The first is a permit to be issued by the State Treasurer, after approving the proposed policies and contracts of the association, to persons designated by the association to solicit applications for membership. The second type of permit referred to is a "final permit." It is provided in said Section 4 that no "final permit" shall be issued by the Treasurer until it is made to appear that there are not less than 500 bona fide applications for membership in an aggregate amount of not less than \$500,000.00.

You request my opinion as to whether an association, having deposited bonds in the amount of \$2,500.00 must deposit the balance of the \$2,500.00 in bonds in the next succeeding twelve months following the issuance of the first permit to solicit members, referred to in said Section 4, or the "final permit" referred to in said Section 4.

It is my opinion that the balance of \$2,500.00 in bonds must be deposited in twelve equal monthly payments immediately following the issuance of the first permit to solicit members of the association, and such monthly payments cannot be deferred until after the issuance of the "final permit."

CHAPTER VII

INTOXICATING LIQUORS

June 28, 1939—O-398.

SALE TO MINORS—SUBSECTION (G), SECTION 11, CHAPTER 16,774, LAWS OF FLORIDA, 1935

Dear Sir:

This will acknowledge receipt of your letter of June 27th requesting my opinion as to whether or not Subsection (g) of Section 11, Chapter 16,774, Laws of Florida, Acts of 1933, which is as follows:

"It shall be unlawful for any licensee to sell, give, serve or permit to be served intoxicating liquors, wines or beers to persons under twenty-one years of age, allows the sale of wine or beer of alcoholic content of 3.2% by volume or less.

In reply I wish to advise that I find that Section 13 of said Act defines intoxicating liquors. I quote from the same:

*"All liquors, wines and beers containing more than 3.2 per cent of alcohol by weight shall be deemed and held to be intoxicating liquors, wines and beers * * *"* (Italics ours.)

This section seems to be clear and I can see no reason why it does not fully answer your question.

July 22, 1939—O-492.

APPLICATION OF LAW RE: SALE WINES AND BEER

Dear Sir:

I am in receipt of your letter of the 21st, in which you inquire as to whether or not Subsection (k) of Section 11 of Chapter 16774, Laws of Florida, 1935, prohibits the sale of only distilled spiritous beverages between the hours of 12 P. M. Saturday to 12 P. M. Sunday, or whether it prohibits the sale of beer and wine if they contain more than 3.2 per cent of alcohol by weight. In reply thereto I would state that Subsection (g) of Section 11 provides as follows:

"It shall be unlawful for any licensee to sell, give, serve or permit to be served intoxicating liquors, wines or beers to persons under twenty-one years of age."

Section 13 of said Act provides as follows:

"All liquors, wines and beers containing more than 3.2 per cent of alcohol by weight shall be deemed and held to be intoxicating liquors, wines and beers. The sales of such intoxicating liquors, wines and beers in counties

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where their sale is prohibited shall be a violation of this Act. All persons convicted of such violation shall be punished as herein provided."

Subsection (k) of Section 11 provides as follows:

"The sale of intoxicating liquors between the hours of 12:00 P. M., Saturday and 12:00 P. M. Sunday, is hereby prohibited except in incorporated cities and towns. Such incorporated cities and towns are hereby authorized by ordinance or resolution hereafter to regulate or prevent such sales."

It therefore appears to me that this law contemplates a difference between intoxicating liquors and intoxicating wines and beers, and since only the sale of intoxicating liquors is mentioned in Subsection (k) that this section only prohibits the sale of *intoxicating liquors* between the hours mentioned except in incorporated cities and towns and does not prohibit the sale of beers and wines containing more than 3.2 per cent of alcohol by weight during these hours.

The last paragraph of Section 15 of said Act is as follows:

"Nothing in this Act contained shall be construed to affect or impair the power or right of any incorporated town or city of the State hereafter to enact ordinances regulating the hours of business and locations of places of business, and prescribing sanitary regulations therefor, of any licensee hereunder within the corporate limits of such city or town."

You will see from this section that the cities and towns have the express right under this statute and under their police power to enact ordinances regulating the sale of intoxicating liquors, wines and beers within the confines of their boundaries.

February 24, 1940—O-740.

EMPLOYMENT OF MINORS UNDER SIXTEEN YEARS OF AGE

Dear Sir:

Section 5950 (4027) of the Compiled General Laws of 1927 provides:

"No person under twenty-one years of age shall be employed, permitted or suffered to work in, about, or in connection with any pool room, billiard room, brewery, saloon, or barroom, where intoxicating liquors are manufactured or sold."

The above quoted provision does not prohibit the employment of persons under twenty-one years of age from being employed by persons licensed under Subparagraph I of Section 5 of Chapter 16774, Laws of Florida, Acts of 1935, to sell only beverages containing alcohol of not more than 3.2 per cent by weight in counties where the sale of intoxicating liquors, wines or beers is prohibited.

Section 5950 of the Compiled General Laws of Florida above quoted does

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prohibit the employment of persons under twenty-one years of age by persons licensed under Subparagraph 11 of Section 5 of Chapter 16774, Laws of Florida, Acts of 1935, to sell beverages containing alcohol of more than 3.2 per cent by weight.

Section 5933 (4030) of the Compiled General Laws of Florida, 1927, prohibits the employment of any children under the age of sixteen years at any occupation injurious to the morals of such children.

March 29, 1940—O-774.

LEGALITY OF TRANSPORTATION AND POSSESSION OF IN-
TOXICATING BEVERAGES FOR CONSUMPTION ONLY IN
DRY COUNTY, AFTER LEGAL PURCHASE IN
WET COUNTY

Dear Sir:

Your letter of March 27th reached me in due course. In that letter you propounded the following proposition for my opinion:

"Is it legal for a resident of a county that has voted against the sale of intoxicating beverages to purchase such beverages from a qualified retailer in a county that has voted for the sale of these beverages and transport or cause them to be transported into the county that has voted against the sale of such intoxicating beverages, provided they are for consumption only?"

Your attention is directed to Chapter 18016, Acts of 1937, and particularly to Sections 1, 2, 3 and 4 of that Chapter. Those sections appear as subsections 10, 11, 12 and 13 of Section 7648 in the 1940 permanent supplement of the Compiled General Laws of Florida.

The sections mentioned are the only ones applicable to the question propounded by you and provide that it shall be unlawful for anyone to sell or cause to be sold, to keep or possess with intent to sell or dispose of unlawfully, or to keep or maintain a place for the sale of intoxicating liquors, wines or beer in any county that has voted against the sale of intoxicating liquors, wines or beers. It is, of course, unlawful to do any of the things prohibited in those sections.

In my opinion nothing contained in those sections makes it illegal for a resident of a county that has voted against the sale of intoxicating beverages to purchase such beverages from a qualified retailer in a county that has voted for the sale of such beverages and transport them or cause them to be transported into the county which has voted against the sale of such beverages provided, they are for consumption only in the dry county. Hence, in my opinion the question propounded by you should be answered in the affirmative.

It is impossible for me to lay down a definite rule in reply to a question such as that propounded, for guidance of your office in specific cases, except to say generally that the legality of such a transaction will depend upon where the sale of such intoxicating beverages has been made or consummated. In

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other words, provided there is a bona fide sale in a place where such sale is legal, there is no statutory prohibition against the transportation or possession of such beverages for consumption only in a county which has voted against the sale of such beverages. However, particular cases might conceivably arise involving different factual situations in which there might be a serious question as to where the sale actually was made, and I can not in response to a general question such as propounded lay down any definite rule for your guidance in particular cases, but would have to know all of the facts in each case in order to determine where the sale was made.

August 26, 1940—O-902.

STORAGE IN WAREHOUSE IN DRY COUNTY FOR SALE IN WET COUNTY

Dear Sir:

Your letter of August 23rd reached this office in due course, in which letter you request an opinion upon the following question:

"Under Chapter 18016, Laws of 1937, and other pertinent laws, can alcoholic liquors be stored in a warehouse in a dry county, such as Leon, for sale in a wet county such as Wakulla County."

Section 2 of Chapter 18016, Acts of 1937, provides:

"That it shall be unlawful for any one to keep, or possess, intoxicating liquors, wines or beer in any county that has voted against the sale of such intoxicating liquors, wines or beer with intent to sell or dispose of them unlawfully."

This section of Chapter 18016 appears to be the only section which deals with the possession or keeping of intoxicating liquors in a dry county; and you will note that the only thing prohibited by the section above quoted is the keeping or possession of such liquors in a dry county "with intent to sell or dispose of them unlawfully."

In my opinion, it follows that it is not necessarily unlawful to store alcoholic liquors in a warehouse in a dry county; it being necessary that they be stored in such dry county with intent to dispose of them unlawfully in order to constitute a violation of the Florida law applicable.

There is no point in going into detail as to what would constitute an intent to dispose of such liquors unlawfully, since your question appears to assume that the storage of such liquors in a dry county would not be for sale in such county, or would not be done with intent to violate any statute prohibiting the disposal of such liquors in the dry county; and each case would have to rest upon its own facts in so far as the intent to dispose of such liquors in a dry county is concerned. I do not find any other provision of law which would indicate that the foregoing is not the proper con-

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struction to be placed upon the Act in question in order to effectuate the intent of the Legislature.

September 29, 1939—O-585.

CONSTRUCTION OF CHAPTER 16774, ACTS OF 1935—WHETHER
EMPLOYMENT OF MINORS, WHERE DISABILITIES OF
NON-AGE HAVE BEEN REMOVED, MAY BE PER-
MITTED IN PLACES WHERE INTOXI-
CATING LIQUORS ARE SOLD

Dear Sir:

In your letter of the 20th instant you state:

"I have a letter from the State Labor Inspector advising that he has two cases where girls eighteen and nineteen years old have had their minor disabilities removed under Chapters 5052 to 5053, inclusive. They claim immunity from Chapters 5950-5027-6918, Acts of June 4, 1915, Child Labor Law, which prohibits any person under twenty-one years of age having employment in places where intoxicating liquors are sold.

"Please advise me whether or not they can claim this exemption."

Section 5950 (4027) of the Compiled General Laws of Florida, 1927, provides:

"No person under twenty-one years of age shall be employed, permitted or suffered to work in, about, or in connection with any pool room, billiard room, brewery, saloon, or barroom, where intoxicating liquors are manufactured or sold."

The penalty for violation of the provisions of Section 5950 is found in Section 7979 (5751), Compiled General Laws, and is directed against any person who employs a minor in violation of the prohibition of Section 5950, and also against any person having under his control such minor. What is now Section 5950, Compiled General Laws, was originally enacted as Section 10 of Chapter 5686, Acts of 1907, and amended by Section 1 of Chapter 6918, Acts of 1915. The intent of said enactment was to protect and safeguard persons under the age of twenty-one years from effect of the recognized evil influence of such places.

In submitting an amendment to Article XIX of the Constitution of Florida by House Joint Resolution 83, Acts of 1933, it was provided in Section 2:

"All laws relating to intoxicating liquors, wines and beer which were in effect on December 31, 1916, unless changed by the Legislature by laws expressly made, effective concurrently with this amendment, shall as so changed

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become effective with this Article, and shall remain until thereafter changed by the Legislature."

The said amendment was adopted at the General Election in 1934, and the Legislature at its regular session in 1935 enacted Chapter 16774, the title to which is as follows:

"An Act Regulating and Taxing the Manufacture, Distribution, and Sale of Beverages Containing More Than One Per Centum of Alcohol, Creating and Providing for a State Beverage Department, Providing Penalties for the Violation of this Act, and Repealing Existing Laws Concerning said Beverages."

By Paragraph (j) of Section 11 of Chapter 16774, it is provided:

"It shall be unlawful for any vendor licensed under subsections III, IV, V, VI, VII, and VII½ of Section 5 hereof to employ any person under twenty-one years of age, whose disabilities of non-age have not been removed, to work in the place of business of such vendor."

Subsection III of Section 5 relates to vendors operating places of business where beverages are sold only in sealed containers for consumption off the premises where sold. Sub-paragraphs IV, V, VI, VII and VII½ of Section 5, relate to vendors operating places of business where consumption on the premises is permitted. All of these are retail vendors.

Apparently, the Legislature intended by the enactment of Paragraph (j) of Section 11 of Chapter 16774, to change the prohibition contained in Section 5059 (4027), Compiled General Laws, to the extent, but only to the extent that it is not unlawful for persons licensed as retail vendors under the provisions of Subsections III, IV, VI, VII, and VII½ of Section 5 of Chapter 16774, to employ persons under the age of twenty-one years, whose disabilities of non-age have been removed, to work in the place of business of such licensed retail vendors. This change, however, does not authorize the employment of persons under the age of twenty-one years to work in any pool room, billiard room, brewery, or place where intoxicating liquors are manufactured, nor does the provision of Paragraph (j) of Section 11 of Chapter 16774 permit persons under the age of twenty-one years whose disabilities of non-age have been removed, to be employed or permitted or suffered to work in, about, or in connection with any place where intoxicating liquors are sold, except in connection with the particular business of the employer licensed as a retail vendor under the provisions of Subsections III, IV, V, VI, VII, and VII½ of Section 5 of Chapter 16774, Acts of 1935.

In other words, persons under the age of twenty-one years cannot lawfully be employed or permitted to work for any other form of business or amusement carried on in the same place where intoxicating liquors are sold, and if a retail vendor of intoxicating liquors licensed under Subsections III, IV, V, VI, VII and VII½, of Section 5 of Chapter 16774, Acts of 1935, operates or carries on, or permits to be operated or carried on any other

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form of business or amusement in connection with or at or in the same place where his business of a retail vendor of intoxicating liquors is conducted and carried on, neither he nor any other person can lawfully employ or permit any person under the age of twenty-one years to work for or in connection with such other form of business or amusement, even though the disabilities of non-age of such person under the age of twenty-one years may have been removed.

I am therefore of the opinion that the prohibition of Section 5950 (4627), Compiled General Laws of Florida, 1927, is still valid and effective, except to the extent that the same was changed by the enactment of Paragraph (j) of Section 11, Chapter 16774, Laws of Florida, Acts of 1935, so limited as herein pointed out.

November 2, 1939—O-585-1.

CONSTRUCTION OF CHAPTER 16774, ACTS OF 1935—WHETHER EMPLOYMENT OF MINORS, WHERE DISABILITIES OF NON-AGE HAVE BEEN REMOVED, MAY BE PER- MITTED IN PLACES WHERE INTOXICAT- ING LIQUORS ARE SOLD

Dear Sir:

Under date of September 29, 1939, in response to your letter of September 20, 1939, I wrote you on the above subject. My attention has been called to the fact that my letter to you went beyond the scope of your inquiry, and to that extent upon reconsideration I beg leave to amend my said letter of September 29th to read as follows:

Section 5950 (4027) of the Compiled General Laws of Florida, 1927, provides:

"No person under twenty-one years of age shall be employed, permitted or suffered to work in, about, or in connection with any *pool room, billiard room, brevery, saloon, or barroom*, where intoxicating liquors are manufactured or sold."

The penalty for violation of the provisions of Section 5950 is found in Section 7979 (5751), Compiled General Laws, and is directed against any person who employs a minor in violation of the prohibition of Section 5950, and also against any person having under his control such minor. What is now Section 5950, Compiled General Laws, was originally enacted as Section 10 of Chapter 5686, Acts of 1907, and amended by Section 1 of Chapter 6918, Acts of 1915. The intent of said enactment was to protect and safeguard persons under the age of twenty-one years from effect of the recognized evil influence of such places.

In submitting an amendment to Article XIX of the Constitution of Florida by House Joint Resolution 83, Acts of 1935, it was provided in Section 2:

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"All laws relating to intoxicating liquors, wines and beer which were in effect on December 31, 1918, unless changed by the Legislature by laws expressly made, effective concurrently with this amendment, shall as so changed become effective with this Article, and shall so remain until thereafter changed by the Legislature."

The said amendment was adopted at the General Election in 1934, and the Legislature at its regular session in 1935 enacted Chapter 16774, the title to which is as follows:

"An Act Regulating and Taxing the Manufacture, Distribution, and Sale of Beverages Containing More Than One Per Centum of Alcohol, Creating and Providing for a State Beverage Department, Providing Penalties for the Violation of this Act, and Repealing Existing Laws Concerning said Beverages."

By Paragraph (j) of Section 11 of Chapter 16774, it is provided:

"It shall be unlawful for any vendor licensed under sub-sections III, IV, V, VI, VII and VII½ of Section 5 hereof to employ any person under twenty-one years of age, whose disabilities of non-age have not been removed, to work in the *place of business* of such vendor."

Subsection III of Section 5 relates to vendors operating places of business where beverages are sold only in sealed containers for consumption off the premises where sold. Subparagraphs IV, V, VI, VII and VII½ of Section 5, relate to vendors operating places of business where consumption on the premises is permitted. All of these are retail vendors.

Apparently, the Legislature intended by the enactment of Paragraph (j) of Section 11 of Chapter 16774, to change the prohibition contained in Section 5059 (4027), Compiled General Laws, to the extent, but only to the extent that it is not unlawful for persons licensed as retail vendors under the provisions of Subsections III, IV, V, VI, VII, and VII½ of Section 5 of Chapter 16774, to employ persons under the age of twenty-one years, whose disabilities of non-age have been removed, to work in the place of business of such licensed retail vendors.

CHAPTER VIII

SCHOOLS

SECTION 1

School Code

August 4, 1939—O-514.

PROCEDURE FOR DETERMINING NUMBER OF INSTRUCTION UNITS FOR TRANSPORTATION BASED ON AREA— SECTION 1005

Dear Sir:

This is in reply to your letter of August third, in which you state:

"The following two technical questions have arisen with reference to the interpretation of this Subsection:

"1. Where any transportation route runs along the coast should the equivalent of regular government-survey land sections which lie wholly in the water, and which are within one and one-half miles of the regular route be counted in determining instruction units for transportation based on area, or should only those sections lying at least partly on land be counted?

"2. In view of the fact that Sections 209 and 210 of the Florida School Code require the operation and maintenance of separate schools for white and negro children, and that separate transportation systems are required, may the sections within one and one-half miles of white bus routes be counted as prescribed, then may the sections within one and one-half miles of negro bus routes also be counted as prescribed in determining instruction units based on area, even though some of these latter sections may duplicate sections served by white buses?"

Section 1005 of the School Code enacted at the 1939 session of the Florida Legislature provides that the number of instruction units for transportation in each county shall be computed on the basis of (1) the number of transported pupils, and (2) the area in which the pupils are transported. Subsection (2) of Section 1005 reads in part as follows:

"—One instruction unit shall be allowed for each fifty-six land sections of school transportation area computed as follows: each regular governmental survey land section, or the equivalent of such section where not established by government survey, shall be counted which is wholly or partially within one and one-half miles of the regular route of any school bus which has a combined passenger seating capacity in excess of eighteen linear feet, and each additional such land section shall be counted which is traversed by a route served by a smaller motor vehicle which transports pupils at public expense; Provided that no section shall be counted twice * * *."

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In my opinion, answering the first question propounded by you, the intent of the Legislature was not to include in computing the number of instruction units for transportation based on area the territory in the Gulf and Ocean which lies adjacent to transportation routes along the coast. Only those sections lying at least partly on land should be counted. This legislative intent is disclosed by the provision of Section 1005, which requires instruction units for transportation to be computed on the basis of "the area in which pupils are transported."

In my opinion, answering the second question propounded by you, a section of land can be counted only once in computing the number of transportation units on the basis of area, regardless of the fact that through necessity white and negro school bus routes may duplicate each other. Section 1005 (2) specifically states, "provided that no section shall be counted twice." The intent of the legislature was thus made clear that in computing the number of instruction units on the basis of area, no section was to be counted twice.

August 4, 1939—O-515.

TRANSPORTATION OF PUPILS OF HIGH SCHOOL GRADES TO
A CENTRAL HIGH SCHOOL—DEFINITION OF HIGH
SCHOOL GRADES—SECTION 213

Dear Sir:

You submit for my consideration the opinion of the Supreme Court of Florida, written on petition for rehearing in the case of Reaves, et al., v. Sadler, et al., which opinion was filed May 30, 1939.

In this opinion, the Supreme Court expressed the view that the integrity of a Special Tax School District cannot be undermined by action of a County Board of Public Instruction in transporting pupils residing in one district to a school in another district for no other reason than that the pupils prefer one school over another. In its opinion, the Court stated, however,

"This is not to be construed as holding that pupils of high school grades cannot be transported to a central high school when circumstances justify."

You particularly request my opinion as to whether the portion of the opinion above set forth would authorize the transportation of pupils in the seventh and eighth grades to a central high school. It would seem that Section 213 of the School Code enacted in 1939, would have a bearing on the determination of this problem.

This section reads as follows:

"Section 213. PUBLIC SCHOOLS REQUIRED.—The public schools of the State of Florida shall provide for twelve consecutive years of instruction which shall constitute the uniform system of public free schools prescribed

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by Section 1 of Article XII of the Constitution and which shall include the following:

"(1) **ELEMENTARY SCHOOLS.**—Elementary schools shall comprise all classes and grades through the sixth or, upon decision by the County Board, when authorized by regulations of the State Board, may include work through the eighth grade.

(2) **HIGH OR SECONDARY SCHOOLS.**—High or secondary schools shall include junior high schools with grades seven to nine, inclusive; senior high schools with grades ten to twelve, inclusive; or junior-senior high schools with grades seven to twelve, inclusive; or, upon decision by the County Board when authorized by regulations of the State Board, may be organized as four-year high schools comprising grades nine to twelve, inclusive."

If the County Board, pursuant to Section 213, *supra*, organizes the elementary schools so as to include the first six grades and the higher secondary schools so as to include grades seven to nine, then it would seem that the transportation of pupils in the seventh and eighth grades would come within the exception contained in the opinion of the Supreme Court. If, however, the primary school in the district where the pupils reside includes the first eight grades, then the County Board would not be authorized to transport those in the seventh and eighth grades to another district, for the sole reason that such pupils prefer the school in the other district.

August 17, 1939—O-536.

TRANSPORTATION OF PUPILS—WHAT ITEMS CAN BE CHARGED
UNDER SECTION 1012, CHAPTER 19355

Dear Sir:

This will acknowledge receipt of your letter of August 16th. You state that "Section 1012 of Chapter 19355, Acts of 1939, provides that 'Warrants for the expense incurred for the transportation of pupils or for instructional salaries may be drawn against the transportation portion of the Teachers Salary Fund allotted to any county.'" And that "The expense for the transportation of pupils may presumably include a variety of items."

You list a number of items and then propound the following questions:

"May all such items be considered as expense incurred for the transportation of pupils within the meaning of this section? Is it permissible for warrants to be drawn against the transportation portion of the Teachers Salary Fund for any or all such items of expense when properly incurred for the transportation of pupils?"

In reply I wish to advise that Chapter VIII, under the heading "Transportation," Section 801, *et seq.*, of this same Act fully sets forth the authority of the Boards with respect to transportation, and it authorizes transportation for each pupil under certain circumstances.

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Since the law authorizes the transportation of pupils by the County Boards, the question of the items that make up the expense of such transportation is one of fact and not of law, and as to whether or not the items that you have listed above can all be charged against this fund will, of course, depend upon their use and you can determine this as a question of fact.

I do not believe you will encounter much difficulty as the provisions of Chapter VIII under the title "Transportation" are rather broad.

August 17, 1939—O-538.

BONDS OF COUNTY SCHOOL OFFICIALS—WHETHER OR NOT SECTION 1089 IS RETROSPECTIVE OR PROSPECTIVE

Dear Sir:

This will acknowledge receipt of your letter of August 16th. You state:

"Section 1089 of Chapter 19355, Acts of 1939, provides for the bonding of County School Officials, prescribing larger bonds for certain officials than heretofore required."

You request me to advise you "whether this new schedule is effective immediately, or when present bonds expire, or when the terms of officials now in office expire?"

An examination of the pertinent part of this section discloses in paragraph 1 relating to County Superintendents:

"Before *assuming office, being commissioned or assuming responsibility* for any school bonds or property or records, the county superintendent shall execute * * * a bond."

In paragraph 2 relating to members of the County Boards, it provides:

"Each and every member of the county board of the several counties in the State of Florida *elected or appointed* to such office before *he is commissioned or assumes office* shall be required to execute a bond. * * *"

It is a well known rule of statutory construction that statutes are always presumed to be intended to operate prospectively and are never to be construed as having a retrospective effect unless the terms thereof clearly show such a legislative intention. *McCarty v. Havis*, 2 So. 819; *In Re Seven Barrels of Wine*, 3 So. 627.

Bearing this rule in mind, I am of the opinion that this Statute does not show a clear legislative intention to make its requirements retrospective, but when you take into consideration the language used that I have above quoted, particularly the part thereof that I have italicized, it clearly appears to me that it was the intention of the Legislature that this Act should operate prospectively.

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Therefore, the new bond schedule is not effective immediately and will only apply when the terms of officials now in office expire.

August 30, 1939—O-555.

COMPUTING INSTRUCTION UNITS—SECTION 1004

Dear Sir:

This is in reply to your letter of August 24th.

You request my opinion as to substantially the following state of facts. The State Board of Education has promulgated a regulation which reads as follows:

"A school to be considered as having a high school department for purposes of computing instruction units must have an enrollment of thirty (30) or more pupils in grades above the sixth; provided, that any school to be considered a junior high school for computation of instruction units must have six (6) or more pupils above the eighth grade, and to be considered a senior high school must have six (6) or more pupils above the eleventh grade; and provided further that isolated schools that have been accredited by the State Board of Education for the next preceding year with less than thirty (30) pupils enrolled above the sixth grade may be considered as having a sufficient number of high school pupils for purposes of computing instruction units."

You inquire as to whether this regulation is valid.

The problem has arisen in one of the counties with regard to the application of this regulation in computing the number of instruction units to be credited to that county for a particular two-teacher elementary school which had an average attendance during the last school year in the grades from the first to sixth, inclusive, of 60.29 and in the grades from seventh to ninth, inclusive, of 19.35. Under the regulation above set forth, no junior school units would be granted, but the aggregate average attendance of 79.64 would be used in computing the number of elementary units. The practical problem arises by reason of the fact that a junior high school unit is worth 22 per cent more than an elementary unit and is computed on the basis of a smaller average daily attendance. See Section 1004 of the School Code.

An instruction unit, in the final analysis, is simply a statutory unit of measurement on the basis of which school funds are distributed to the counties of the State, as required by Article XII, Sections 7 and 9 of the Florida Constitution. Sections 1004, 1005 and 1006 of the School Code provide for the ascertainment of the total number of instruction units of each county, computed both for instruction personnel and transportation. The amount to which each county is entitled can then be ascertained by multiplying the number of instruction units for a given county by the amount of the State appropriation for each instruction unit, less any amounts that may be de-

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ducted under other provisions of the law. I refer to the nature of an instruction unit so as to make it entirely clear that it is simply a unit of measurement and nothing more.

The question which here arises is whether, in the particular instance here involved, the average daily attendance in junior high school grades of 19.35 should be considered in computing junior high school units or simply added to the daily attendance to be used in computing elementary units. Under the regulation concerning which you inquire, the latter construction would be adopted. This regulation has been challenged on the following two grounds: first, that it is an attempt by an administrative body to prescribe the classification for distributing school funds which classification is required by the Constitution to be made by statute; and, second, that it is contrary to Sections 1004 and 213 of the School Code to classify junior high school attendance on the same basis as elementary school attendance.

Section 1004 of the School Code provides for the computation of elementary units as follows:

"(h) *In a two or more teacher elementary school with an average daily attendance of less than three hundred, two units shall be counted for the first forty pupils in average daily attendance and one unit for each additional thirty-five pupils or major fraction thereof.*" (Italics ours.)

In the same section the computation of junior high school units is provided by the following:

"(a) *For the first thirty pupils in average daily attendance two units shall be counted, and for the number of pupils above thirty and less than two hundred and seventy-five in average daily attendance one unit for each thirty-two pupils or major fraction thereof shall be counted.*" (Italics ours.)

Computing the instruction units in the particular instance under consideration, on the basis of Section 1004 of the School Code, it would appear that credits should be given for no junior high school units, for the reason that the statute specifically requires an average daily attendance of thirty pupils before the first two units shall be allowed. This means that if there is less than an average daily attendance of thirty pupils, no junior high school instruction units are to be credited. This construction necessarily follows from the language of the statute itself. This does not mean, however, that the statute contemplates that all attendance under thirty in junior high school grades is to be discarded in computing the share of the county in the distribution of school funds. The language of Section 1004 of the School Code, relating to elementary units, would be sufficiently comprehensive to authorize the junior high school attendance, which might otherwise be discarded, to be computed as elementary units. The words of Section 1004, "in a two or more teacher elementary school," do not necessarily limit the computation of elementary units on the basis of attendance in elementary schools of elementary pupils, but would authorize the addition of such junior high school attendance as would not, in itself, be sufficient to require junior high school units. If

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this construction were not followed and if the average junior high school attendance were discarded from consideration because it did not meet the statutory requirement of an average daily attendance of thirty pupils, Sections 7 and 9 of Article XII of the Florida Constitution would undoubtedly be violated. It is the duty of administrative officials to construe statutes, when the construction is authorized by the language therein, in such a way as to avoid contravening the Constitution.

It is my opinion that the particular regulation concerning which you inquire is not in conflict with either the Constitution or the School Code. It may be that this regulation is more or less superfluous, because the statutory provisions must, themselves, be so construed as to arrive at substantially the same result.

September 9, 1939—O-563.

PROPOSED LEASE ACTUALLY SALE OF PROPERTY—AUTHORITY TO BORROW UNDER SECTION 1085—"LAND" FOR SCHOOL SITES

Dear Sir:

Under date of April 11, 1939, I advised you concerning the general powers of a school board to lease a building for school purposes for a term of years. I there stated that a building could be rented if the county board determined, from the facts and circumstances of a particular case, that a lease for a term of years is *necessary*.

A further question has arisen with regard to the application of the rule stated in that opinion in a particular instance involving a building erected by the Works Progress Administration with the cooperation of the City of Auburndale and the school officials of Polk County. The City owns title to the property. It was proposed that the building be leased by the City to the County School Board for a period of four years at a rental of \$750.00 per year, said lease to contain an option giving the School Board a right to purchase the property at the end of the four-year period for an additional consideration of approximately \$1,500.00. It is my opinion that such an arrangement would constitute a sale of the property to the County School Board on a purchase plan extending over a period of years and would not actually be a lease. Such a sale would contravene the provisions of Article IX, Section 6, of the Florida Constitution. It would not be essentially different from the agreement considered in the case of Sholtz, et al., v. McCord, 150 So. Rep. 234.

Under Section 1085 of the School Code, enacted at the 1939 session of the Florida Legislature, specific authority is provided for borrowing money for the "purchase of land for school sites." It is further provided that the County Board is authorized under certain conditions to create obligations to be retired within a period of four years. It is my opinion that the purchase

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of the property in Auburndale could be financed in accordance with the provisions of said Section 1085.

While Section 1085 refers only to the purchase of "land" this is not to be construed as prohibiting the purchase of land and *buildings* located thereon. The word "land" is to be construed as synonymous with "real estate." The following definition of the word "land" appears in Black's Law Dictionary, Second Edition, page 694:

"The word 'land' includes not only the soil, but everything attached to it, whether attached by the course of nature, as trees, herbage, and water, or by the hands of man, as buildings and fences."

September 26 1939—O-574.

PUBLICATION OF NOTICE OF SPECIAL TAX SCHOOL
DISTRICT ELECTION REQUIRED

Dear Sir:

This is in reply to your letter of September 20, in which you request my opinion as to whether notice of a regular biennial school district election must be published. You further inquire as to whether it would be sufficient to give notice of all special tax school district elections in one published notice, in view of the fact that the School Code requires elections to be held on the same day throughout the State.

The provisions of the School Code relating to the procedure for holding and conducting regular biennial school district elections are set forth in Section 1032, Subsection (2) of the School Code. One of the provisions appearing therein is that "all school district elections shall be held and conducted in the manner prescribed by law for holding general elections, except as provided in this article." It is further provided that the "cost of the publication of the notice of the election" and all election expenses shall be paid by the County Board out of district funds.

The only provisions in the general law relating to publication of notice of elections are contained in Section 220, Revised General Statutes, 1920 (Section 255, Compiled General Laws). This requires the publication of notice of the election at least once a week, beginning at least sixty days prior to holding the election.

In view of the fact that all special tax school district elections must, under the School Code, be held on the first Tuesday after the first Monday in November in odd-numbered years, it would be sufficient for the County Board to include all districts in a combined notice of election. This would not have been advisable, however, before the enactment of the School Code, for then there was no uniform election day prescribed by law.

In view of the fact that the School Code expressly adopts the provisions of the general law, Section 249, Revised General Statutes, 1920 (Section 305,

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Compiled General Laws), must be observed. This requires the publication or posting of the names of inspectors and clerks for at least fifteen days before the day of holding the election. This requirement would be complied with by advertising once a week for a period longer than fifteen days. See *Scully v. Neminger*, 60 Southern Reporter 180.

September 28, 1939—O-584.

CONSTRUCTION OF LAW—AS TO WHETHER BONDS ISSUED
UNDER CHAPTER 19784 ARE ELIGIBLE FOR INVESTMENT
OF SINKING FUNDS COLLECTED FOR RETIREMENT
OF DUVAL COUNTY SCHOOL DISTRICT BONDS

Gentlemen:

In your letter of the 27th instant you call attention to Chapter 19784, Laws of Florida, Acts of 1939, creating the Duval County Air Base Authority, and also to Section 1055 of Chapter 19355, Laws of Florida, Acts of 1939, known as the School Code. You thereupon request my opinion as to whether the bonds authorized to be issued under Chapter 19784 will be eligible for investment of the sinking funds collected for the retirement of any bonds of any school district in Duval County.

Section 1055 of Chapter 19355 empowers the County Board of Public Instruction of the several counties of the State to invest the sinking fund of any school district of their respective counties in any general county bonds of the same county. Your inquiry depends for determination on the question of whether bonds issued by the Duval County Air Base Authority under the provisions of Chapter 19784 are "general county bonds" within the purview of the provisions of Section 1055 of Chapter 19355. The district created by Chapter 19784 is territorially co-extensive with Duval County. The bonds authorized by Chapter 19784 when issued, sold and delivered, shall become and be binding, valid and legal obligations of the Authority "and for the security and payment of said bonds and the interest thereon, the entire taxable property lying within said Authority and the full faith and credit thereof shall be pledged."

Section 1054 of Chapter 19355 authorizes and empowers the County Boards of Public Instruction to invest the sinking funds of school districts in United States Government bonds and the bonds fully and unconditionally guaranteed as to principal and interest by the United States.

Section 1055 further authorizes and empowers the county boards to invest such funds in any bonds of another school district in the same county, and then follows the provision here under consideration.

It is evident that the Legislature was endeavoring to provide for the protection and security of the sinking funds of school districts as a matter of prime importance. In authorizing the investment of sinking funds of school districts in "any general county bonds" of the same county, I am of the

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opinion that the Legislature had in mind bonds that are county-wide, backed by full authority to assess and collect taxes on all the taxable property in the county, and for which the full faith and credit of the Authority shall be pledged.

I am therefore of the opinion that the bonds authorized to be issued under the provisions of Chapter 19784, when duly issued, will be eligible for investment of the sinking funds of any school district or districts in Duval County, Florida.

September 29, 1939—O-587.

CONSTRUCTION OF SUBSECTION 2 OF SECTION 1060—
REQUIREMENT OF BIDS FOR PURCHASES
COSTING MORE THAN \$300.00

Dear Sir:

You call my attention to Subsection 2 of Section 1060 of Chapter 19355, Laws of Florida, Acts of 1939 (School Code), which reads as follows:

"(2) Bids.—Bids shall be requested from three or more sources by the County Board for any authorized purchase costing more than three hundred dollars (\$300.00). The County Board shall have the authority to reject any or all bids and request new bids. In the acceptance of bids, the County Board shall accept the lowest and best bid."

You state six questions with regard to the construction of the statutory provisions above set forth. I shall separately state each question, followed by my opinion with regard to same, as follows:

1. Are County Boards required to secure these bids on the basis of advertisement or may they send out requests for bids and then proceed to award contracts as prescribed?

The statute does not require bids to be secured on the basis of advertisement. It will be sufficient if the County Board requests bids from three or more sources on any purchase exceeding \$300.00.

2. If the County Board employs a bus driver, janitor or any other person and pays any such person by the month although the contract covered for the year would be more than \$300.00, would this section be at all involved?

The employment of a bus driver, janitor, or other person would not be governed by the provisions of the statute here considered, for such statutory provisions relate only to purchase of property and not to employment of persons.

3. A County Board has been contracting for its bus routes but decides county ownership would be more economical. Could it draw up contracts to purchase the equity in the buses the contractors now operate or would it be necessary to call for bids?

The purchase of used school buses, if the purchase price exceeds \$300.00

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would come within the statutory provisions here considered. It would be necessary to call for bids.

4. If a County Board plans to contract with persons to furnish and operate their own buses to serve certain routes designated by the Board, are bids required for each route?

A contract with a person to furnish and operate a school bus actually constitutes two contracts. First, such a contract includes the employment of a person, to-wit, the driver. Secondly, it contemplates the furnishing of equipment, to-wit, the bus. Since two contractual elements are combined in one contract, it would come within the statutory provisions here considered. It would be optional with the County Board, whether bids would be made for particular routes or for the entire transportation system.

5. If the County Board is taking out liability insurance on school buses or any other form of insurance is it necessary to follow the provisions of this section and secure bids or would the fact that rates are uniform for the various types of policies make it unnecessary to secure bids under this provision?

It is my opinion that contracting for public liability insurance on school buses is not such a "purchase" as would bring it within the provisions of the statute here considered.

6. Could a County Board purchase several thousand dollars worth of supplies without securing bids by having the company from which the purchase is made submit separate bills for the various items, each of which would be less than \$300.00?

To do this would be to circumvent the mandatory provisions of the statute. This would be a violation of the statutes.

September 29, 1939—O-592.

CONSTRUCTION OF SUBSECTION (7) (b) OF SECTION 423 RE:
APPOINTMENT OF NON-INSTRUCTIONAL EMPLOYEES UPON
"RECOMMENDATIONS" OF COUNTY SUPERINTENDENT

Dear Sir:

You call my attention to Subsection (7) (b) of Section 423, Chapter 19355, Acts of 1939 (School Code) which reads as follows:

"(b) Appointment: Other than Instructional Staff and Other Employees in District Schools.—To act on *written recommendations* submitted by the County Superintendent of persons to act as administrative, supervisory, attendance, or health assistants, his office assistants, and bus drivers, and to appoint persons to fill such positions." (Italics ours.)

You propound six questions with regard to the proper construction of the statutory provisions above set forth. All six questions propounded by you involve the meaning of the words, "written recommendations" appearing in the

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statutory provisions under consideration. The word "recommendation" has been defined in Black's Law Dictionary, Second Edition, page 998, as follows: "The act of one person in giving to another a favorable account of the character, responsibility, or skill of a third."

One of the definitions of the word "recommend" appearing in Webster's New International Dictionary is: "To advise; counsel."

In requiring the County School Board to act on written recommendations submitted by the county superintendent, the Legislature obviously intended that the county superintendent should give the County School Board the benefit of his advice and that advice should be in writing. The words of the statute, however, could not be construed as making it mandatory for the County Board to accept such "written recommendations."

With the foregoing in mind, I shall separately state each of the questions propounded by you and my opinion with regard to the proper answer, as follows:

1. If the County Board rejects any recommendation submitted by the county superintendent can the County Board act on its own initiative without giving the county superintendent a chance to submit another written recommendation?

It is my opinion that this question should be answered in the affirmative.

2. If the County Board rejects a recommendation submitted by the county superintendent can the county superintendent recommend the same person for the same position a second time for consideration by the County Board, or must he submit a different recommendation?

The county superintendent may, with the permission of the County Board, submit a different recommendation.

3. If the county superintendent states that he has no other recommendations to submit can the County Board then proceed on its own initiative to fill the position under consideration?

This question should be answered in the affirmative.

4. Should the County Board give reasons for rejecting any recommendation submitted by the county superintendent?

It is my opinion that this is not necessary, unless the County Board sees fit to state its reasons for rejecting a recommendation.

5. If the County Board should state its reasons for rejecting a recommendation, is any reason it may give sufficient or should it give reasons that would be recognized as valid?

The County Board is not required to state any reasons. It would therefore follow that the legal sufficiency of any reasons stated would be immaterial.

6. If valid reasons for rejecting are required might the State Board prescribe by regulation the criteria for determining valid reasons?

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As before stated, the County Board may accept or reject the recommendations of the county superintendent, without stating any reasons.

October 3, 1939—O-594.

**CONSTRUCTION RE: QUALIFICATIONS OF ELECTORS IN
SPECIAL TAX SCHOOL DISTRICT ELECTIONS**

Dear Sir:

This is in reply to your letter of September 22. In that letter you request my opinion with regard to numerous questions relating to the qualifications of electors in various classes of special tax school district elections.

Your inquiry relates, first, to elections held pursuant to subsections 1, 2, 3 and 4, of Section 1032 of the School Code and, second, to district bond construction fund elections, under Section 118, Subsection 7, and Section 1039, of the School Code. I shall consider the questions propounded by you in two separate divisions of this opinion:

ELECTIONS UNDER SECTION 1032 OF THE SCHOOL CODE

Subsections 1, 2, 3 and 4, of Section 1032 of the School Code provide respectively for the following types of elections:

1. Organization of a district.
2. Regulate biennial district tax and trustee election.
3. Consolidation of districts.
4. Reorganization of districts.

I shall separately state each question propounded by you and follow the question with a statement of my opinion:

(a) Are the qualifications of electors the same for each of these types of elections?

It is my opinion that the qualifications of electors are the same for each of the four types of elections provided for in Subsections 1, 2, 3 and 4, of Section 1032 of the School Code.

(b) What are the qualifications for electors for these elections?

The qualifications for elector in the four classes of elections hereinabove considered are:

1. He must be qualified as an elector to vote in general State and county elections under the laws of Florida.
2. His voting registration must be in the territory in which the election is being held.
3. He must pay a tax on real or personal property in the district and he must have paid a tax on real or personal property for the year next preceding any such election. (See Section 1032 [1] [e] of the School Code.)

The test of whether a particular person is qualified to vote in any of the

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elections herein referred to is that he possess all of the qualifications hereinabove set forth.

(c) Qualified Elector Requirement.

(1) Must a person be on the registered list of qualified electors of the district in order to vote in the election?

(2) What is the latest date a person may be placed on a registered list to be eligible to vote in the election?

(3) Must the elector have voted in the last preceding general election?

(4) Is the wife of a qualified elector eligible to vote in the election?

The following is my opinion:

1. A person must be on the registered list of qualified electors of the district in order to vote in the election.

2. If a tax payer pays his taxes on the day of the election, he may be qualified, provided his name has been placed on the list of certified electors by the supervisor of registration, under Section 1032, Subsection (2) (b). See my opinion to you under date of July 22, 1939.

3. It is not necessary that the elector shall have voted in the last preceding general election in order to vote in a special tax school district election.

4. The qualifications of a wife of a qualified elector must be determined entirely separate from those of her husband. The mere fact that the husband is qualified does not establish the qualifications of the wife. It would therefore follow that the payment of taxes by the husband could not be considered in determining the qualifications of the wife as an elector in such elections.

(d) Residence Requirement.

(1) Under what condition is an elector to reside in the territory affected rather than in the district?

(2) How long must he have resided in the district or territory?

(3) May an elector whose voting registration is in the district vote by absentee ballot?

(4) If a person has resided in the district and is otherwise qualified but has been convicted of a felony is he eligible to vote in the election?

The following is my opinion:

1. In an election held to accomplish the *organization* of a special tax school district, it is necessary that the elector be a resident of the *territory* sought to be included in the district.

2. A person must have resided in the special tax school district or territory for a sufficient length of time to enable him to become a qualified elector in general elections and to have his name included on the list of qualified electors of the county. In such counties as keep their registration books open the year round, a person may register on the registration books of the county up to the second Saturday of the month preceding the date of the election. (See opinion of Attorney General, dated March 12, 1937.)

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3. A person may vote in a special tax school district election by absentee ballot. See Chapter 16985, Acts of 1935, and Chapter 11824, Acts of 1927 (Sections 435-438, Compiled General Laws).

4. A person who has been convicted of a felony and whose rights of citizenship have not been restored, is not eligible to vote in a special tax school district election. See Sections 4 and 5 of Article VI of the Florida Constitution, and Section 215, Revised General Statutes 1920 (Section 248, Compiled General Laws).

(e) Tax Requirements.

(1) Must an elector have paid taxes on all of his property in order to be eligible to vote?

(2) If a person owns property in the district but does not pay taxes by reason of Homestead Exemption is he entitled to vote in the election?

(3) If a person owns property and pays no taxes on the property by reason of Homestead Exemption except for debt service to the district bond interest and sinking fund is he eligible to vote in elections prescribed herein?

(4) Must he own property in the district in order to be eligible to vote?

(5) Is a voter qualified to vote if he pays his taxes on the day of the election?

(6) Is a person eligible to vote in an election if he has not paid his tax for the preceding year?

(7) If a person has paid a tax for the preceding year but has not paid a tax for some other preceding year is he eligible to vote?

(8) If a person has not paid taxes for a number of years but has recently settled his taxes under the so-called Murphy Law, is he eligible to vote?

(9) Is it required that poll taxes be paid?

The following is my opinion in regard to the foregoing questions:

1. Elector does not have to pay taxes on *all* of his property in order to be eligible to vote. The requirement that a person must pay a tax on real or personal property relates to an ad valorem tax, to-wit, a tax imposed upon real or personal property, based upon the valuation of the property, as distinguished from other forms of taxation, such as license or privilege tax; and the payment of an automobile license tax would not entitle a person to vote in special tax school district elections.

2. If a person is exempt from payment of taxes on all of his property, whether real or personal, in a district for any reason whatsoever, he is not eligible to vote in a special tax school district election. Section 1032 (2) (d) authorizes all qualified electors "who *pay* a tax on real or personal property within the district" to vote. A statement to the contrary in the opinion of the Attorney General under date of March 12, 1937, is hereby overruled, as well as a statement referring to that earlier opinion in my opinion dated July 22, 1939. It is clear that both the School Code and Article XII, Section 10,

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of the Florida Constitution, require the electors to *pay* a tax on real or personal property. The payment of *any* ad valorem tax on real or personal property in the district would be sufficient. It is not required that the taxes paid be school district taxes.

3. A person who pays for debt service is, under both principles announced above (2) and by reason of the fact that such levies are "taxes," eligible to vote in a special tax school district election.

4. A person must own either real or personal property within the district in order to vote in a special tax school district election.

5. If a person pays his taxes on the day of the election, he may be qualified to vote, provided his name is placed on the certified list of qualified electors by the supervisor of registration. (See my opinion under date of July 22, 1939).

6. Section 1032, Subsection 1 (e) provides that a tax must have been paid on real or personal property for the year next preceding any such election.

7. A person who has paid a tax on real or personal property for the preceding year, but has not paid a tax for some other preceding year, is eligible to vote.

8. A person who has not paid taxes for a number of years but has recently settled his taxes under the Murphy law, is eligible to vote.

9. Chapter 18061, Acts of 1937, dispensed with payment of poll taxes as a prerequisite to vote.

**ELECTIONS UNDER SECTION 118, SUBSECTION 7, AND SECTION 1039, OF THE
SCHOOL CODE**

The elections considered in this division of my opinion are those relating to issuance of bonds and are known as District Bond Construction Fund Elections. I shall separately state your questions and my answers thereto.

(a) Must an elector in a district bond construction fund election possess all of the qualifications required for an elector in a district tax or trustee election?

An elector in a district bond construction fund election must possess all the qualifications required for an elector in a district tax or trustee election, considered in the first division of this opinion.

(b) What additional qualifications are required?

In addition to the qualifications of an elector in a district tax or trustee election, an elector in a district bond construction fund election must be a freeholder. He must own real property located within the district. See Article IX, Section 6, of the Florida Constitution; also Section 118 (7) of the School Code.

(c) If a person is exempt from paying taxes for any reason whatsoever is he eligible to vote in a district bond election?

If a person is exempt from paying taxes, his status as a freeholder is not changed. If a person, otherwise qualified, owns real property in a district,

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he is a freeholder in the district regardless of whether he is exempt from taxation with respect to that real property.

This opinion supersedes all previous opinions relating to the qualifications of electors in special tax school district elections written prior to the enactment of the Florida School Code.

November 2, 1939—O-592.

CONSTRUCTION OF SUBSECTION (7) (b) OF SECTION 423 RE:
APPOINTMENT OF NON-INSTRUCTIONAL EMPLOYEES
UPON "RECOMMENDATIONS" OF COUNTY
SUPERINTENDENT

Dear Sir:

This is in reply to your letter of October 16.

You call my attention to Subsection (7) (b) of Section 423, Chapter 19335, Acts of 1939 (School Code), which reads as follows:

"(b) Appointment: Other than Instructional Staff and Other Employees in District Schools.—To act on *written recommendations* submitted by the County Superintendent of persons to act as administrative, supervisory, attendance, or health assistants, his office assistants, and bus drivers, and to appoint persons to fill such positions." (*Italics ours.*)

You propound six questions with regard to the proper construction of the statutory provisions above set forth. All six questions propounded by you involve the meaning of the words, "written recommendations" appearing in the statutory provisions under consideration. The word, "recommendations" has been defined in Black's Law Dictionary, Second Edition, page 998, as follows:

"The act of one person in giving to another a favorable account of the character, responsibility, or skill of a third."

One of the definitions of the word "recommend" appearing in Webster's New International Dictionary is: "To advise; counsel."

In requiring the county school board to act on written recommendations submitted by the county superintendent, the Legislature obviously intended that the county superintendent should give the county school board the benefit of his advice and that advice should be in writing. The words of the statute, however, could not be construed as making it mandatory for the county board to accept such "written recommendations."

With the foregoing in mind, I shall separately state each of the questions propounded by you and my opinion with regard to the proper answers, as follows:

1. Does the statute contemplate that the county superintendent shall submit just one recommendation for a position or may he if he chooses submit several such recommendations for any given position?

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a. If the county superintendent may submit more than one recommendation for a position and chooses to do so may he also designate his recommendations to be acted upon in the order of what he considers to be the qualifications of the persons for the position?

b. Would the county board be expected to act on the recommendations in the order in which submitted, that is, if several recommendations are submitted and the persons recommended are listed in the order of their qualification for the position, if the county board should accept the sixth person on the list would it be presumed to have rejected all others above the sixth name on the list before having accepted that person?

c. In the event the county superintendent submits just one recommendation for a position and the county board rejects that recommendation would it be reasonable to assume that the county board would give the county superintendent an opportunity to submit within a reasonable time another recommendation for that position before the county board proceeds to act on its own initiative?

It is my opinion that the county superintendent under the statutory provisions here considered, may submit as many recommendations for a position as he may see fit. It is my further opinion that:

a. The county superintendent may designate his recommendations in the order in which he estimates the qualifications of the persons so recommended for the position.

b. If several recommendations are submitted and the persons recommended are listed in the order of their qualifications, the acceptance of any person on the list would necessarily constitute the rejection of all others listed as having superior qualifications. In other words, if the person designated as the sixth best qualified is employed, it would necessarily be a rejection of the five persons given a preferential listing by the county superintendent.

c. If the county superintendent submits just one recommendation for a position, it is within the discretion of the county board to give him an opportunity to submit further recommendations within any period of time designated by the county board.

2. If the county board rejects a recommendation submitted by the county superintendent can the county superintendent recommend the same person for the same position a second time for consideration by the county board, or must he submit a different recommendation?

If the rejection results from a misunderstanding as to the actual qualifications of the person recommended it would be proper for the county superintendent to recommend the same person for further consideration.

3. If the county superintendent states that he has no other recommendations to submit can the county board then proceed on its own initiative to fill the position under consideration?

This question should be answered in the affirmative.

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4. Should the county board give reasons for rejecting any recommendation submitted by the county superintendent?

It is my opinion that this is not necessary, unless the county board sees fit to state its reasons for rejecting a recommendation.

5. If the county board should state its reasons for rejecting a recommendation, is any reason it may give sufficient or should it give reasons that would be recognized as valid?

The county board is not required to state any reasons. It would therefore follow that the statement of any reason would be immaterial.

6. Are the county superintendent's office and other assistants enumerated in this sub-section answerable directly to the county board for instructions and directions and for the efficiency of their work, or are they to be responsible directly to the county superintendent and through him to the county board?

Such employees as work in or in connection with the office of the county superintendent should be responsible directly to the county superintendent and through him to the county board. In view of the fact that the county superintendent is required to make complicated reports to the State Board of Education, and the State Superintendent of Public Instruction, it is essential that the county board employ only competent office assistants, willing and able to cooperate with and work under the direction of the county superintendent. It is reasonable to assume that a county board of public instruction will, under usual conditions, hesitate to reject recommendations of the county superintendent with regard to employees in or directly connected with the office of the county superintendent. If this were not the case, it would be possible for an intolerable condition to exist, in which the county superintendent would be compelled to rely on assistants who could openly defy and ignore his directions.

December 13, 1939—O-667.

CHAPTER 6428 AND CHAPTER 6813 SUPERSEDED BY CODE
INsofar AS ACTS APPLY TO SCHOOLS

Dear Sir:

You call my attention to Chapter 6428, Laws of Florida, Acts of 1913, and to Chapter 6813, Laws of Florida, Acts of 1915, which require financial statements to be made to the State Comptroller by various county officers, including the county board of public instruction and the county superintendent of public instruction. You request my opinion as to whether Chapter 19355, Laws of Florida, Acts of 1939, known as the School Code, repeals the portion of the Act first above named, insofar as they relate to filing annual financial reports by county superintendents of public instruction with the Comptroller.

In view of the fact that the School Code provides for the filing of annual reports with the State Superintendent of Public Instruction, it is my opinion that it supersedes the earlier Acts insofar as the same relate to schools and

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insofar as they require annual financial reports to the Comptroller by county superintendents of public instruction. The State Department of Education has previously expressed this same view in the volume known as "Florida School Laws, 1939." See table at page 372 thereof.

December 28, 1939—O-729.

DESIGNATION OF "ATTENDANCE AREAS" WITHOUT REGARD
FOR DISTRICT BOUNDARIES—DETERMINING PARTICULAR SCHOOL TO BE ATTENDED BY PUPILS.

Dear Sir:

You propound a series of questions relating to the responsibility for determining schools to be attended by children and the areas from which children are to attend schools. I shall separately state and reply to the questions submitted by you.

1. Who has the responsibility for determining the area from which children are to attend each school center?

To begin with, an "Attendance Area" is defined in Section 118 (10) of the School Code, as follows:

"(10) Attendance Area.—An attendance area is the area from which pupils are designated to attend a given school; that is, the territory served by any given school."

Under Section 433 (6) (a) it is the duty of the county superintendent to recommend the location of schools needed to accommodate the pupils of the county and the area from which children should attend each school. Under Section 423 (6) (a) the county board of public instruction approves the area from which children are to attend each school, such area to be known as the attendance area for that school. In addition to the above provisions of the School Code, I also call your attention to Section 435 thereof, which reads as follows:

"Section 435. Schools Under Control of County Board and County Superintendent.—All public schools conducted within school districts, for the support of which school district funds are used, shall be under the direction and control of the County Board with the County Superintendent as executive officer and shall be subject to the same laws and rules and regulations as are prescribed for the conduct for all schools in the county, except as hereinafter provided."

In view of the provisions of the School Code above referred to, it is my opinion that the county board has the responsibility for determining the area from which children are to attend a particular school.

2. Are these areas expected to be restricted by the boundaries of existing school districts, or to be arranged insofar as practicable to permit the attend-

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ance of pupils at school centers at which facilities needed by the pupils can most conveniently and economically be provided?

That the attendance areas are not necessarily to be restricted by the boundaries of existing school districts is apparent from the provisions of Section 423 (6) (b) of the School Code, which reads in part as follows:

"(b) Adequate Educational Facilities for All Children Without Tuition.—To see that adequate educational facilities are provided through the uniform system of public schools for all children of school age in the county, these facilities to be provided with due regard to the *needs of the children* on the one hand and to economy on the other. Insofar as possible, arrangements are to be made for children to attend, without tuition charges to such children on account of district or county lines, these schools *offering the facilities needed by the children* which are most readily assessible and which would involve the least cost, regardless of whether those schools are located in another district than that in which the children reside or are located in another county * * *," (Italics ours.)

3. When such attendance areas have been established may the county board authorize adjustments such that children from an attendance area for a given school may attend other convenient schools offering facilities needed by those children and not available in the attendance area designated for the school they would otherwise attend?

In view of the provisions of Section 423 (6) (b) set forth under question "2," it is my opinion that this question must be answered in the affirmative. This conclusion is in harmony with the provisions of Section 423 (6) (c) of the School Code, which authorizes the county board to determine the grade or grades in which work is to be offered in each school center.

4. If the county board has the responsibility for taking the above steps and exercises that responsibility, does the principal of a school or do the trustees of a district have the authority to accept children from attendance areas in the county other than that designated by the county board for that school?

It is my opinion that this question should be answered in the negative, unless it appears that such children come within the exception considered in question "3." The provisions of the School Code relating to compulsory attendance and "child accounting" contemplate that the county superintendent should prepare a list for the principal of each school of those children of compulsory attendance age within the attendance area of his school. (See Section 611 and 612 of the School Code.)

5. If the responsibility indicated in Question 1 above is not exercised by the county board in any county:

a. By whom should the areas from which children are to attend the various schools be determined?

b. Are decisions made in this manner legally binding on the parents of all children concerned or are such parents free to send their children to a school in another district in which they will be accepted?

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It is not necessary to answer this question in view of the reply hereinabove set forth to question "1."

6. Can the trustees of a district prevent a pupil from leaving the district or parents from sending their children out of the district:

a. To attend a school in another district in which work is offered which is not available at convenient schools in the district in which he resides?

b. To attend a school in another district which offers facilities comparable with those available in schools in that district?

c. To attend a non-public school?

In answering the question above stated, it is well to consider the decision of the Supreme Court of Florida in the case of *Reaves v. Sadler*, 189 So. 41, which construed the law in effect prior to the enactment of the School Code. In this case, the trustees of Special Tax School District No. 9 of Orange County and others brought a bill to enjoin the county board of public instruction and others from carrying out a resolution of that board permitting children located in District No. 9 to attend school in District No. 7. The Court granted the injunction to be effective at the close of the school year. On rehearing, the Court stated, in its opinion, the following:

"(6-8) The Constituiton provides for the creation of Special Tax School Districts. The statute provides the manner of creation, the abolition, and the change of boundaries of Special Tax School Districts. When a Special Tax School District is created, the necessary inference is that all pupils within said district are required to attend the school or schools located therein. There is no power vested in a Board of Public Instruction to authorize their attendance or transportation to any other school or district except for reasons of convenience as contemplated by the latter part of Section 718, Compiled General Laws of 1927, 'Convenience' as employed in this Act has reference to physical barriers and geographical conditions and is a matter of compact between the districts affected and the Board of Public Instruction. It is not controlled by caprice or preference.

"(9) When a Special Tax School District is created it becomes the duty of the people resident therein, including the Board of Public Instruction, to maintain the integrity of the district and to support its school or schools by attending the one nearest them. It is begging the question to contend that the Board of Public Instruction has the power to cart off to some other district over half the pupils of one district for no other reason than that they prefer the other school. If this can be done, there is no such thing as preserving the integrity of a Special Tax School District. This is not to be construed as holding that pupils of high school grade cannot be transported to a central high school when circumstances justify."

While Section 718, Compiled General Laws of Florida, referred to in the opinion of the Supreme Court, has been superseded by the provisions of the School Code referred to in this opinion, nevertheless, it is to be borne in mind that special school districts are created under the organic law of the State. (See Article XII, Section 10, of the Florida Constitution.) The provisions

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of the School Code, relating to the designation of attendance areas should be so administered as not to destroy the integrity of school districts. In other words, the provisions designating attendance areas should not be used as a substitute for provisions authorizing consolidation and elimination of school districts.

Answering your specific interrogatives, the trustees should not be able to prevent children from attending school in another district in which work is offered which is not available at convenient schools in the district, whenever such attendance is authorized by the county board. In view of the language of the Supreme Court in the opinion in the case of *Reaves v. Sadler*, above set forth, it would mean that the trustees would be able to prevent a pupil from attending school outside of the district in which he resides, when such pupil is within the attendance area designated for a school of his own district and authorization has not been given for him to attend another school by reason of facilities there offered, which are more suited to the needs of the pupil. The trustees can not prevent a pupil from leaving the district or parents from sending a pupil out of the district to attend a non-public school. (See Section 602 of the School Code.)

January 6, 1940—O-683.

**AUTHORITY OF COUNTY BOARD TO EXCHANGE SPECIAL TAX
SCHOOL DISTRICT BONDS ACQUIRED THROUGH DISTRI-
BUTION OF BONDS TAKEN IN UNDER FUTCH
ACT FOR REFUNDING BONDS**

Dear Sir:

You state substantially the following problem:

In Broward County, there has been a distribution by the board of county commissioners of bonds taken in in payment of taxes under the so-called Futch Act. Under this distribution, bonds of many of the special tax school districts were delivered to the county board of public instruction for the purpose of balancing the accounts among the particular special tax school districts. The result has been that in some instances the county board of public instruction holds for the account of some districts the bonds of other special tax school districts. Can the county board of public instruction legally exchange the bonds so held for refunding bonds?

It would seem that the provisions of Section 423 (4) of the School Code would be applicable to this situation. Under the provisions of this section, the county board is authorized to manage and dispose of property held by it to the best interest of education. It would follow that if the county board of public instruction deems it to be for the best interest of education in the county to exchange special tax school district bonds held for the account of particular districts for refunding bonds, it would have the power to do it.

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January 8, 1940—O-688.

LOCATION AND PLACES WHERE LIQUORS ARE SOLD WITHIN
MUNICIPALITIES—CONSTRUCTION OF SECTION 922 OF
SCHOOL CODE AND SECTION 2 OF CHAPTER
19301, ACTS OF 1939*Gentlemen:*

This is in reply to your joint request for my opinion with regard to substantially the following question:

Section 2 of Chapter 19301, Laws of Florida, Acts of 1939, provides in part as follows:

"No license under Subsections III, IV, V, VI, VII, VII½ of Section 5, Chapter 16774, Laws of Florida, 1935, shall be granted to a vendor whose place of business is or shall be within *2,500 feet of an established school or church* except in incorporated cities and towns, *which said corporated cities and towns* are hereby given the power *hereafter to establish* zoning ordinances restricting the location wherein such licensees may be permitted to conduct such place of business and no license shall be granted to any such licensee to conduct a place of business in a location where such place of business is prohibited from being operated by such municipal ordinance." (Italics ours.)

Section 922 of the Florida School Code, which became a law on the same date as Chapter 19301, provides as follows:

"Section 922. Undesirable Places Prohibited Near Sites.—No place at which liquors are sold, gambling devices are provided, or other features classed under regulations of the State board as detrimental to the moral or physical welfare of children shall be located nearer than *three hundred feet* to any school site." (Italics ours.)

Does any agency within the State now have a legal right to license or permit to be operated within three hundred feet of a school site any place as which liquors are sold?

The statutes above referred to are to be construed together, so as to render each effective as far as possible. Section 922 of the School Code must be construed as a limitation on the right to maintain a place at which liquors are sold within three hundred feet of a school site within the limits of a municipality, without prejudice to the right of the municipality to establish zoning ordinances requiring such places of business to be removed even farther than three hundred feet from a school site. In any event, however, such places are not to be located within three hundred feet of a school site.

Licenses are granted by the State Beverage Department to be used at a particular place of business described in the license. There is a further pro-

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vision authorizing the licensee to move his place of business. Since this is true, it is my opinion that the State Beverage Department must ascertain whether any proposed place of business of any applicant is located in violation of the statutes hereinabove first considered. If the proposed location is within three hundred feet of a school site the license should not be granted.

The circumstance that the provision prohibiting the maintenance of a place for the sale of liquors within three hundred feet of a school site is contained in the School Code rather than in the laws primarily relating to alcoholic beverages would not be material, particularly in view of the fact that under Section 1-A of Chapter 19301, Acts of 1939, the Director of the Beverage Department is given the authority to revoke the license of any licensee for violation of any of the laws of this State.

February 27, 1940—O-741.

INTERPRETATION OF SECTION 541, RE: ILLNESS-IN-LINE-
OF-DUTY LEAVE

Dear Sir:

This is in reply to your letter of February 17, in which you propound questions relating to the interpretation of Section 541 of the Florida School Code. I shall separately state and reply to the questions propounded by you.

1. (a) If a member of the instructional staff of a Florida public school should contract a cold or influenza, or any other contagious or infectious disease, while engaged in school work in a classroom or school building, would that person be entitled to compensation for illness-in-line-of-duty leave as provided under Section 541 of the Florida School Laws?

It is my opinion that a member of the instructional staff of a public school in Florida, who contracts a cold or influenza, or any other contagious or infectious disease, while engaged in school work in a classroom or school building, would be entitled to compensation for illness-in-line-of-duty leave. It must be shown, however, that such illness was actually contracted while so engaged in school work in school or classroom.

(b) What steps would be necessary for a member of the instructional staff to establish that any illness was contracted while she was engaged in the performance of school duties?

It is my opinion that it is a matter for the county school board to decide in each particular case whether a contagious or infectious disease was actually contracted by the member of the instructional staff while engaged in school work in a classroom or school building. It is conceivable that in particular instances the county school board would require a physician's certificate or other proof, while in others the county school board could take into consideration the prevalence of the disease contracted in the school. It would seem to be advisable, however, that the county school board should formulate some

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definite procedure to establish whether illness in particular instances, is contracted while the member of the instructional staff is engaged in the performance of school duties.

2. (a) Under the provisions of Section 541, Florida School Code, or under any other law, would a county board be justified in paying illness-in-line-of-duty compensation to a member of the instructional staff of any public school for a period in excess of ten days for any one year?

The provisions of Section 541 and its subdivisions (1-3) must be considered binding in the case of compensation for illness-in-line-of-duty leave. Section 541 (1) states that leave of absence for illness in line of duty "shall be authorized for a total of *not to exceed* ten school days during any school year." It is my opinion, therefore, that a county school board could not be authorized to pay illness-in-line-of-duty compensation to any member of the instructional staff of any public school in Florida for a period in excess of ten days in any one year. I do not know of any other law that would justify payment of such compensation for illness in line of duty for more than ten days in any one year. See the opinion of the late Attorney General Cary D. Landis, to the same effect, construing a former law—Sections 4 and 5 of Chapter 13881, Laws of Florida, Acts of 1929 (Section 674 C. G. L. Supplement)—which said opinion is reported at page 176 of the Biennial Report of the Attorney General for the years 1937-1938.

(b) May a teacher who has accumulated twenty days sick leave and who contracts an illness or suffers an injury in connection with her school work claim ten days absence for illness-in-line-of-duty leave and another twenty days sick leave she may have accumulated, provided it is necessary for such teacher to be absent from duty on account of such illness or accident for that entire period of time?

It is my opinion that while a teacher, who contracts an illness or suffers an injury in school work, as provided in Section 541 (1) of the School Code, may claim only ten days leave for illness in line of duty, such teacher has the right to use any days of accumulated sick leave to the credit of such teacher, as provided under Section 540 (1) of the School Code.

February 27, 1940—O-743.

CONSTRUCTION RE: APPOINTMENT OF PRINCIPALS
AND STAFF

Dear Sir:

In your letter of February 19 you call my attention to Section 423, Subsections (7) (c) and (e) of the Florida School Code which require the county school board to act not later than six weeks before the close of school during any year on the appointment of principals, and to act not later than four weeks before the close of school during any year on the appointment of members of the instructional staff. You request my opinion with regard to

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several questions involving the construction of the statutory provisions to which reference is hereinabove made. I shall separately state your questions and my opinion concerning same as follows:

"1. (a) What would be the status of a teacher or principal who had been teaching in the schools of the county, but who did not receive any notice either of appointment or of dismissal within the time prescribed in the above section?

"(b) Would such a person be entitled to a contract for the ensuing year on the presumption that he would have been notified as required by law if the county board did not intend for his services to be continued?"

Answering the first part of the above question, it is my opinion that the teacher or principal who had been teaching in the schools of the county, is not automatically reappointed for the following year upon failure of the county superintendent or county school board to act with regard to the appointment of principals and other instructional employees within the time prescribed by law. The duty on the part of the county superintendent and the county school board is a continuing one. Appointments of principals and instructional employees must be the result of an affirmative action and cannot be made by default in the performance of a duty required by law to be performed by the county superintendent and the county school board within a specified time.

Answering the second part of the above question, it is my opinion that a person is not entitled to a contract for the ensuing year on the basis of any presumption that he should have been notified if the county board did not intend for his services to be continued.

The second question propounded by you is as follows:

"2. What would be the status of such a person, who, not having been notified within the time prescribed above, writes a letter to the county superintendent as executive officer of the county board stating that in view of the fact that he has received no notice to the contrary he presumes that he is to be continued in service during the ensuing year and that he will accept the contract?"

It is my opinion that the writing of a letter by a person employed as a teacher or principal to the county superintendent as executive officer of the county school board stating his willingness to accept a contract of employment for the ensuing year would not affect the status of such a person. Until such a person has been actually nominated as required by law, a letter cannot create a contract of employment. As in every other contract of employment, there must be an offer on the part of the employer and an acceptance by the employee.

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March 1, 1940—O-746.

INTERPRETATION OF SECTION 540—SICK LEAVE FOR
MEMBERS OF INSTRUCTIONAL STAFF*Dear Sir:*

This is in reply to your letter of February 17, in which you propound a series of questions relating to the interpretation of Section 540 of the Florida School Code. I shall separately state and reply to your questions.

1. Should Section 540 be interpreted to authorize sick leave for members of the instructional staff who are absent on account of the illness or death of a guardian or other person who has served in the relationship of a parent or guardian to a member of the instructional staff?

It is my opinion that the above question must be answered in the affirmative. In granting leave of absence to a member of the instructional staff, by reason of the illness or death of "father, mother, brother, sister, husband, wife, or child," it would certainly appear to be the intent of the Legislature to include a guardian or other person who has served in the relationship of a parent. This conclusion finds support in the definition of the term, "parent," contained in Subsection 16 of Section 118, of the Florida School Code. A parent is there defined as referring to either or both parents, or to any guardian, or to any person in parental relationship to the child.

2. (a) Is a county board required to allow sick leave to a teacher who is entitled to such leave and to pay such teacher for absence during the period for which she is entitled to sick leave or is the allowing of sick leave an optional matter which is to be determined by the respective county boards?

(b) Is the amount of sick leave which may be allowed a teacher limited to five days per year or may a county board in its discretion allow and pay a teacher for a longer period of absence on account of sickness? In other words, does this section mean that a teacher is entitled to claim not more than five days sick leave plus cumulative leave or that the county board is to have authority to pay for not more than five days of sick leave plus cumulative leave?

Answering subdivision (a) of the above question, it is my opinion that under the provisions of Section 540 of the School Code, the allowance of sick leave is mandatory and is not an optional matter to be determined by the respective county boards.

Answering subdivision (b) of the above question, it is my opinion that under the provisions of Section 540 of the School Code, the amount of sick leave which may be allowed to a teacher is limited to five days per year, and the County School Board has no discretion to allow and pay a teacher for a longer period of absence on account of sickness. In other words, the county school board is not authorized to pay a teacher who is absent for the reasons defined in Section 540 of the School Code for more than five days, plus cumulative leave to which the teacher is entitled under the law.

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3. (a) Is sick leave ever cumulative for prior years other than just the preceding three years? For example, how many days sick leave would a teacher be entitled to in 1940 who had not claimed any sick leave in 1933-34, 1934-35, and 1935-36, but had claimed three days in 1936-37, no days in 1937-38, and one day in 1938-39? To how many sick days leave would a teacher be entitled during 1939-40 who had claimed no days in 1934-35, none in 1935-36, three in 1936-37, ten in 1937-38, and seven in 1938-39?

(b) Is there any limitation on the time during a year when a teacher may claim sick leave? That is, may a teacher be allowed to claim her full sick leave for the year during the first month of the school term for which she has contracted? May a county board in its discretion grant sick leave even though the teacher has not earned it, or is it necessary for her to use sick leave during a year only in the proportion in which it is earned?

(c) Shall a teacher who has contracted to teach but who becomes ill before school opens and is not able to resume her work until some time after school opens be entitled to pay for any sick leave she may have accumulated from prior years?

(d) May a teacher or other member of the instructional staff of a school who has been injured in an accident and has to be absent for that reason claim any accumulated sick leave during such absence?

Answering subdivision (a) of the third question, it is my opinion that sick leave under Section 540 of the School Code is cumulative for a period of three years only. Section 540 provides:

" * * * Unused sick leave credit for any year may not be claimed later than the end of the third year thereafter."

You ask my opinion with regard to two specific cases. In the first case, the teacher had not claimed any sick leave in 1933-34, 1934-35, and 1935-36, but claimed three days in 1936-37, no days in 1937-38, and one day in 1938-39. This teacher would be entitled to a total of sixteen days in 1939-40. In the second specific case, the teacher claimed no sick leave in 1934-35 and 1935-36, three days in 1936-37, ten days in 1937-38, and seven days in 1938-39. This teacher would be entitled only to the five days for the current year in 1939-40.

It is my opinion that when a teacher is absent for the reasons set forth in Section 540, she is entitled to have her absence charged against her available sick leave in the following manner: Her absence is to be charged first against the available sick leave for the third year prior to the current year; when available sick leave for that year is exhausted, it is to be next charged against the second year before the current year, and then against the year before the current year; it is only when all available accumulated sick leave for prior years is exhausted that the absence of the teacher is to be charged to the sick leave available during the current school year.

Answering subdivision (b) of the third question, it is my opinion that there is no limitation on the time during the year when the teacher may claim sick leave. A teacher may be allowed to claim her full sick leave even during

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the first month of the school year. Section 540 limits the amount of sick leave available during any one year, but it does not limit the time of the year during which sick leave is available.

Answering subdivision (c) of the third question, it is my opinion that a teacher who has contracted to teach but who becomes ill before school opens and is not able to resume her work until after school opens, is entitled to pay for sick leave accumulated from prior years.

Answering subdivision (d) of the third question, it is my opinion that a member of the instructional staff who is absent by reason of an injury received in an accident may claim accumulated sick leave during such absences.

4. When a member of the instructional staff of a public school becomes ill or some member of her immediate family becomes ill or dies and she must be absent from her duties, is it necessary for that person to notify her principal or the county superintendent immediately of such illness or death, or may she have her claim for compensation for sick leave honored and paid by the county board regardless of the fact that she did not give immediate notice of her proposed absence and the reasons for the same?

Answering the fourth question, it is my opinion that the county school board may, by regulation, require teachers to give notice of any contemplated absence in advance, if possible. Orderly procedure in the schools would make it imperative that the teacher notify the principal as soon as possible after she finds that she can not be present. Section 540 (3) requires the filing of a written certificate setting forth the day or days absent, that such absence was necessary, and that the claimant is entitled to receive pay for such absences. It would therefore appear that the teacher is entitled to pay upon filing of such certificate, as above set forth.

5. In case a woman knows she is pregnant at the time she signs a contract to teach, can she later claim sick leave for all or a part of the time she must be out of school on account of her confinement?

In replying to the above question, it is essential to distinguish between pregnancy, and the natural discomforts thereof, and confinement. Pregnancy itself is not sickness, as contemplated by Section 540 of the School Code. The following is from Words & Phrases, 5th Series, Volume 4, page 828:

"'Pregnancy' is not per se condition of unsound health or disease or ailment within the meaning of such terms in policy providing for payment of disability benefits, but is existence of condition beginning at moment of conception and terminating with delivery of child. *Lee v. Metropolitan Life Ins. Co.*, 186 S. E. 376, 382, 180 S. C. 475."

The teacher, however, would have to be absent during confinement. It is my opinion that the provisions of Section 540 should be broadly construed so as to permit a teacher to be paid her salary while absent by reason of confinement, within the limitations of her available sick leave.

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March 5, 1940—O-749.

COUNTY SCHOOL BOARD MEMBERS—NOMINATION AND ELECTION—EFFECT OF FAILURE OF BOARD TO DIVIDE COUNTY INTO COUNTY BOARD ELECTION DISTRICTS UNDER SECTION 406*Dear Sir:*

You request my opinion with regard to the following question:

"If the county board in any county fails to divide the county before January 1, 1940, into county board election districts as required by Section 406 of the school laws, would the county board election then be conducted in the county in accordance with Section 408 relating to nomination in primary elections or would the nominations of county board members have to be by countywide vote as required under the old law in the counties involved?"

Section 406 of the School Code requires the county school board, on or before January 1, 1940, to divide the county into county board election districts. Provision is made for both five-member board counties and three-member board counties.

Section 408 of the School Code provides for the nomination in primary elections of county school board members from the county board election districts referred to in Section 406. Section 410 of the School Code provides for the election of the county board members by countywide vote.

Prior to the enactment of the School Code, there were laws affecting various counties providing for nomination, as well as election, of the county school board members from the county at large. The problem to be determined is whether, in the event that the county school board fails to comply with the requirements of Section 406, to divide the county into county board election districts, county board members should be nominated in accordance with laws enacted prior to the School Code, or whether they should be nominated in accordance with Section 408 of the School Code.

Under Section 468, Revised General Statutes of 1920 (Section 579, C. G. L.) the counties of the State have been divided into county school board districts upon substantially the same basis as they are required to be divided in Section 406 of the School Code. If, therefore, the county school board has failed to comply with the requirements of Section 406 of the School Code, this should not result in nullifying the provisions of Sections 408, 409 and 410, of the School Code. In other words, nominations should be made in accordance with Section 408 of the School Code from the districts into which the county has been divided under prior law, for terms as prescribed by Section 409 of the School Code. The election should be countywide vote as prescribed in Section 410. Any laws enacted prior to the School Code, providing for the nomination of county school board members from the county at large, would be repealed by Section 106 of the School Code.

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March 6, 1940—O-755.

**RIGHT UNDER SECS. 931, 932, AND 1060 TO PARTICIPATE IN
WORKS PROGRESS ADMINISTRATION CONSTRUCTION
PROJECT BY FURNISHING MATERIALS***Dear Sir:*

This is in reply to your letter of March 4.

You state that in several counties, the county school boards made arrangements with the Works Progress Administration, an agency of the Federal Government, for the construction of a number of school buildings. You state further that in one instance the authority of the county school board to participate in such a construction project has been challenged on the ground that participation in such project would necessarily constitute a violation of the provisions of Sections 931 and 932 of the School Code if the cost to the county board should exceed \$10,000.00. Construction pursuant to a Works Progress Administration project proceeds on a day-labor basis and is not performed under a comprehensive construction contract.

Briefly stated, Section 931 of the School Code provides for awarding a contract for construction work to the lowest responsible bidder. Section 931 further provides, "For a project costing ten thousand dollars (\$10,000.00) or less, the county board may arrange for the building to be erected on a day-labor basis." Section 932 of the School Code requires the contractor to furnish a surety bond to guarantee fulfillment of the contract.

It is my opinion that whether or not participation in a construction project involving the expenditure of an amount exceeding \$10,000.00 on a day-labor basis violates Sections 931 and 932 of the School Code, must depend upon the nature and extent of the participation by the county school board. If the county school board is required to furnish a sum of money exceeding \$10,000.00 to apply on the total cost of the construction work, for labor, supervision and materials, then it is my opinion that the objection is well founded. I have been favored with a copy of the opinion of the county school board attorney, denying the authority of the county school board to participate financially in an amount exceeding \$10,000.00 in a construction project to be conducted on a day-labor basis. This is the opinion of a highly reputable attorney and is entirely sound as applied to the state of facts considered in that opinion.

From the information set forth in your letter, however, it would appear that quite a different problem is presented. You state that under the agreement entered into between the county board and the Works Progress Administration, the former is to furnish certain building materials, and the latter is to furnish other necessary materials and all labor and supervision. It is my understanding that the county board is free to purchase such materials in exactly the same manner as it would be authorized to purchase other materials necessary to the maintenance of the school system.

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The real question involved, then, is whether the county school board violates Sections 931 and 932 of the School Code, above referred to, simply by furnishing some of the materials used in a construction project carried on by the Works Progress Administration on a day-labor basis, when the cost of such materials exceeds \$10,000.00. It is my opinion that the provisions of Section 931 and 932 of the School Code do not apply to the participation by the county board in a Works Progress Administration project, when the participation is limited to the furnishing of materials. It is my further opinion that the County School Board has the authority to purchase such materials under the provisions of Section 1060 of the School Code, by calling for bids as therein prescribed.

March 28, 1940—O-770.

INVESTMENT OF FUNDS BY BOARD OF TRUSTEES OF
TEACHERS' RETIREMENT SYSTEM—
SECTION 561

Dear Sir:

This is in reply to your letter of March 27.

You request my opinion as to whether it would be legal for the Board of Trustees of the Teachers' Retirement System to invest the several funds created by the Teachers' Retirement Act in Federal Savings & Loan Associations. You call my attention to the desirability of such an investment by reason of the higher interest yield than is available in other securities. You state it to be your understanding that deposits made with such Federal Savings & Loan Associations are guaranteed by the Federal Government up to \$5,000 but that this guarantee does not apply to interest.

The pertinent provision of Section 561 of the School Code, reads as follows:

"The Board of Trustees shall be the trustees of the several funds created by this Act and shall have full power and it shall be the duty of the Board of Trustees, to invest and reinvest such portion of the funds as is not in its judgment required to meet current withdrawals. Such investments may be made only in interest-bearing obligations of the United States or in obligations guaranteed as to both *principal and interest* by the United States." (Italics ours.)

Unless the investments are guaranteed both as to principal and interest by the United States, it is not the type of investment which the board of trustees can make under the provisions of law above set forth.

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April 13, 1940—O-805.

**CONSTRUCTION RE: USE OF DISTRICT FUNDS—TUITION
CHARGES FOR ATTENDING SCHOOLS IN
OTHER DISTRICTS***Dear Sir:*

You call my attention to the fact that it is the duty of the county school board to authorize the location of schools, to approve the area from which children are to attend each school, and insofar as possible to see that arrangements are made for children to attend, without tuition charges to such children on account of district or county lines, those schools offering the facilities needed by the children which are most readily accessible and which would involve the least cost, regardless of whether those schools are located in another district than that in which the children reside. (See Section 423 [6] of School Code.) You state that there are many instances in which children attend school in other districts than those in which they live and that this is particularly true with regard to high school. You further state that there are other districts in which it is more practical for some elementary and high school pupils from a particular district to attend school in another district. You further call my attention to the fact that there are even some districts in which there are no schools and from which all children attend schools in other districts.

In view of the circumstances above stated, you propound five separate questions, as follows:

1. Who should determine the proportion of the cost of providing educational facilities for children who are attending school in other districts which should be met out of the funds of the district in which the children live?
2. What procedures are to be followed in determining and apportioning these costs?
3. If the district from which children come refuses to vote any millage, how is the expense of providing educational facilities for these children to be met, or what steps should be taken toward solving the problem involved?
4. Do the trustees of the district to which children have been assigned to attend school have a right to determine the amount of the expense to be met by the other district or districts and if such expense is not met to exclude the children from school?
5. Under what circumstances, if any, can the trustees of a district require pupils from another district to pay tuition for attending schools in their district?

Before replying directly to the questions above stated, it is essential to have clearly in mind the financial structure of our State public school system. Briefly stated, there are three separate and distinct funds from which our system of public free schools is financed. These funds are:

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(1) The State school fund, created under Article XII, Section 4, of the Constitution. The principal of this State school fund must remain sacred and inviolate, only the interest being applied to the support and maintenance of public free schools.

(2) The County school fund, which consists of the proceeds of a county school tax not less than three mills and not more than ten mills, together with that portion distributed to the respective counties from the following sources: The interest on the State school fund, the one-mill constitutional levy, the proceeds of particular taxes, and other appropriations by the Legislature (See Section 8, Art. XII, of the Constitution, and the case of *State ex rel. Bours v. L'Engle*, 24 So. 539, text page 541).

(3) The special tax school district school fund, which consists of the proceeds of the tax authorized under Section 10 of Article XII of the Constitution, together with proceeds from the sale of school district bonds and other district moneys.

All three of the funds above enumerated supplement each other. The interest on the State school fund is apportioned among the respective counties, under Sections 7 and 9 of Article XII of the Constitution, and becomes a part of the County school fund of such counties. Under Section 1058 of the School Code, the money raised from special tax school district taxes is to be used to supplement the amount available from the State school fund and from the County school fund to maintain a minimum school term of eight months or longer in the particular district. Curtailment of the school term of schools in districts failing to vote the millage recommended as necessary to supplement available funds from the State school fund and County school fund is prescribed in Section 1058 (5) of the School Code.

Despite the fact that that portion of the district fund made up of the proceeds of district taxes is intended under the Constitution and statutes to supplement the amount distributed from the State fund and the County fund, its expenditure is limited, "for the exclusive use of public free schools *within the district*." In other words, the special tax school district is an entity within itself and moneys raised by taxation in such districts are entirely separate and distinct from any other school fund. The following is from the opinion of the Supreme Court of Florida, speaking through Mr. Justice Whitfield, in the case of *Hamrick v. Special Tax School District No. 1 of Jefferson County*, 178 So. 406, text pages 409, 410-411:

"(4) Under Sections 10, 11, and 17 of Article XII, 'school districts' or 'special tax school districts,' though they are within the counties of the State, yet they are by the Constitution made separate and distinct governmental entities, whose taxing power is separate and distinct from the county taxing power for public free schools in the counties, under Section 8, Article XII, and from the county taxing power for county purposes, under Section 5 of Article IX." * * *

"Section 10 and 17, Article XII, clearly make a special tax school district

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a governmental entity with special granted powers that are distinct from the powers conferred upon counties; such powers to be operative only within the territorial limits of the districts respectively."

"A purpose of Article XII of the Constitution is to authorize special public free school facilities in *particular territorially ascertained districts* in a county when voted by the freeholder electors of the districts, such special school facilities to be for the *exclusive use of the public free schools within the districts*, and to be paid for by taxation of property within the districts respectively. The due accomplishment of such designed purpose required provision to be made for the establishment of district governmental entities separate from the county entity, with taxing and administrative powers and functions distinct from county powers and functions (as was done by Sections 10, 11 and 17), though such separate entities called districts are within a county, and though the powers and functions of the districts be supplementary to the school taxing power and other cognate functions of the county, and county officials perform functions for the district under the statutes." (*Italics ours.*)

The following is from the opinion of the Supreme Court of Florida, speaking through Mr. Justice Whitfield in the case of *State ex rel. Clark v. Henderson, et al.*, 188 So. 351, text page 353:

"The proceeds of such school district tax are to be used to supplement other school revenues, to make more efficient, *in the districts* that are formed under Section 10, the uniform system of public free schools which are required *by the Constitution* to be liberally maintained in the various counties of the State including the school districts therein." (*Above italics were used in the Supreme Court opinion.*)

I find no statutory provision authorizing the use in one district of the proceeds of taxes of another district under any circumstances, even to defray part of the cost of educating children who reside in one district and attend school in another. In view of the express requirement of Article XII, Section 10, that the district school tax be for the exclusive use of public free schools within the district, and in view of the language of the Supreme Court of Florida in the case of *Hamrick v. Special Tax School District No. 1 of Jefferson County* (above set forth), it is my opinion that the proceeds of district taxes can only be expended for school purposes "within the territorial limits" of the district.

Within recent years, improved roads and transportation facilities have made it desirable from the standpoint of efficiency and economy to more or less disregard district lines in determining the attendance areas for particular schools (See Section 423 [6] [a] and [b] of School Code). Despite the fact that the statutes now contemplate that arrangements should be made by the county school board for children to attend schools offering facilities needed by the children which are most readily accessible and which would involve the least cost, regardless of whether those schools are located in another district than that in which the children reside, no change has been

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made in the constitutional requirement limiting the expenditure of the proceeds of district taxes within the territorial limits of the district.

At first blush, it would seem that all this would result in imposing an unequal burden of taxation on those particular districts maintaining schools which children from other districts attend. This would undoubtedly be true if it were not for the fact that, in most instances, moneys derived from the State school fund and the County school fund constitute the chief support of all the schools, districts and otherwise. While children from one district may attend school in another district, such attendance is taken into account in computing the number of instruction units to which the county is entitled in the distribution of State money. (See Section 1004 of School Code.) The final outcome would be that additional money necessary for such extra teachers and transportation facilities as may be required by the attendance of children of one district in the schools of another, would largely come from moneys made available under State appropriations. There is nothing to prevent the county board from using district funds for transportation or other school purposes *within the district*. This transportation would, in turn, also be included in the computation of instruction units, and the money obtained by the county on that account would be available either for transportation or for teachers' salaries (see Section 1012 of School Code authorizing the use of transportation fund for teachers' salaries). It thus appears that any inequality is considerably balanced when the entire financial setup is considered.

In view of the principles discussed in this opinion, it is unnecessary to answer separately each of the questions propounded. It is my opinion that moneys derived from taxes in one district cannot be transferred to the account of another district by reason of attendance of children from one district in the schools of the other. This would seem to dispose of the first four questions. It is further my opinion that there are no circumstances under which the trustees of one district can require pupils from another district (who are bona fide residents of Florida) to pay tuition. (See Section 216 [2] of School Code.)

If the district in which children live who attend schools in other districts, refuses to vote the millage recommended pursuant to Section 1058 of the School Code, it is my opinion that such failure is not a sufficient reason to authorize the trustees of the other districts to prevent such attendance. It is within the authority of the county board and not the trustees to determine which particular school children shall attend, and the attendance areas of each school.

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April 15, 1940—O-787.

NO AUTHORITY UNDER SECTION 1085 TO BORROW MONEY
TO MAKE ADDITIONS TO OR ERECT SCHOOL BUILDINGS*Dear Sir:*

You request my opinion as to whether or not under Subsection (1) of Section 1085 of the School Code, a County School Board can create an obligation to be retired within a period of four years, but which cannot be retired during the current fiscal year, for the purpose of making additions to, or remodeling school buildings on sites already owned by the school board.

Subsection (1) of Section 1085 of the School Code reads as follows:

"(1) Purposes Must Be Authorized by State Board.—The purposes for which such obligations may be incurred, within the intent of this Section, shall include only purchase of school buses for transportation of pupils, the purchase of insurance, and the *purchase of land for school sites* as shall be provided by regulations of the State Board." (Italics ours.)

In my opinion to you under date of September 9, 1939, I stated that the statutory provisions above set forth would authorize the purchase of land and buildings located thereon. The question considered in that opinion, however, was different from the one now under consideration. We are not dealing now with the *purchase* of any land.

It is my opinion that an obligation extending over a four-year period cannot be incurred under the provision of Subsection (1) of Section 1085, for the purposes concerning which you inquire.

It is my further opinion that it is not permissible under Subsection (1) of Section 1085 to borrow money to be repaid over a four-year period, to defray, in addition to the purchase price of a site for a school athletic field, the cost of improvements necessary to convert the site into an athletic field. The reason is that the transaction would actually constitute borrowing money for two separate purposes: First, the purchase of a school site, and, second, the improvement of a school site.

May 17, 1940—O-807.

INTERPRETATION OF SECTION 1084 RE: AUTHORITY OF
COUNTY BOARDS TO BORROW MONEY FOR
CURRENT OBLIGATIONS*Dear Sir:*

This is in reply to your letter of May 14, with regard to the interpretation of Section 1084 (1) of the School Code.

Section 1084 (1) of the School Code authorizes county school boards to borrow sums not exceeding 90 per cent of the amount of revenue reasonably expected to be received from the apportionment to the county from the State

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Teachers' Salary Fund. The question presented by you is whether county school boards may borrow not exceeding 90 per cent of the balance from the Teachers' Salary Fund for the current fiscal year which remains unapportioned at the time the loan is made. In other words, after 90 per cent has been borrowed and possibly repaid, has the authority to borrow become exhausted?

It is my opinion that the limitation of 90 per cent is intended to apply to outstanding indebtedness at any time. If, for instance, the county board should borrow 90 per cent and repay it, and then need to borrow again, it could borrow up to 90 per cent of the balance to be apportioned to the county.

By way of illustration, if the undistributed apportionment is \$100,000.00, the board would be authorized to borrow \$90,000.00. Should the board borrow \$85,000.00 it would be authorized to borrow only \$5,000.00 more so long as the previous loan was outstanding. If, however, the previous loan of \$85,000.00 has been repaid from the moneys apportioned to the county from the State Teachers' Salary Fund, the board would then be authorized to borrow 90 per cent of the estimated balance of \$15,000.00.

The views here stated are in accordance with the opinion of the Attorney General, under date of February 10, 1934, reported at page 448 of the Biennial Report of the Attorney General for the years 1935-36, which said opinion construes Chapter 15779, Laws of Florida, Acts of 1931, which was similar in its provisions to Section 1084 (1) of the School Code.

May 25, 1940—O-810.

TEACHERS SALARY FUND—SECTION 1007 (1) SUPERSEDES
CHAPTER 14829, ACTS OF 1931—COUNTY TO RECEIVE
NO MORE FROM APPORTIONMENT OF STATE
MONEY THAN IT HAS BUDGETED FOR
TEACHERS' SALARIES

Dear Sir:

This is in reply to your letter of May 18.

You call my attention to the following provisions contained in Chapter 14829, Laws of Florida, Acts of 1931:

"(a) Provided, that the annual amount to be apportioned for an instruction unit or for instruction units in a given school shall not exceed the total amount of salary or salaries to be paid by the County Board of Public Instruction to the teacher or teachers of that school for the school year, plus an additional thirty-three and one-third (33 1/3%) per cent of the said total salary or salaries; and * * *"

You further call my attention to Section 1007 (1) of the Florida School Code, which provides, in part, as follows:

"(1) Determining Amount of Instructional Salaries.—The amount to which any county is entitled for instructional salaries shall be determined by

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multiplying the number of instruction units for teachers and other members of the instructional staff of the county, calculated as prescribed in Section 1004 above, by the amount appropriated for an instruction unit as provided by law: Provided that if the amount appropriated by the official budget of any county for instructional salaries is less than the amount to which the county would be entitled for instruction units for instructional salaries, then only the amount appropriated in the budget shall be apportioned to the county for instructional salaries; * * *."

You request my opinion as to whether the above provisions of Chapter 14829, have been superseded by the provisions of Section 1007 (1) of the Florida School Code, which was enacted by the Legislature of 1939.

The provisions of the statutory enactments of 1931 and 1939, respectively, above quoted, are similar from the standpoint of the general purpose to be accomplished. Both were intended to prevent the accumulation of surplus moneys in the Teachers' Salary Fund of particular counties through the payment of inadequate salaries to teachers. Under the provisions of Chapter 14829, it is conceivable that such a surplus could be so created because the county could legally spend considerably less than the amount received from the State apportionment. Under the provisions of Section 1007 (1) of the Florida School Code, however, no such surplus can be created by underpayment of teachers. Under said Section 1007 (1) if a county decides to budget for teachers' salaries an amount less than that to which it is entitled under the apportionment of State funds, then its share of the State funds is automatically diminished to the amount so budgeted.

Since the provisions above set forth in the two separate statutory enactments are inconsistent, Section 1007 (1) of the Florida School Code must be construed as superseding the provisions of Chapter 14829, Acts of 1931, above set forth. This is in accordance with Section 106 of the Florida School Code which, with exceptions not important for consideration here, repeals all laws and parts of laws in conflict with the said School Code.

June 12, 1940—O-857.

**CONSTRUCTION RE: TIME LIMITATIONS FOR NOMINATIONS
BY SPECIAL TAX SCHOOL DISTRICT TRUSTEES OF
INSTRUCTIONAL PERSONNEL — IN ABSENCE OF
SUCH NOMINATIONS, COUNTY BOARD MAY
PROCEED TO FILL VACANCIES**

Dear Sir:

This is in reply to your letter of June 1. You request my opinion with regard to limitations of time in which the trustees of special tax school districts can make nominations to the county school board of persons to be appointed to the instructional staff of district schools, both as principals and teachers.

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There is a distinction provided in the School Code between nominations for *reappointment* of principals and teachers and *appointment* of members of the instructional staff in the first instance. Section 443 (1) of the School Code, dealing with the specific powers and responsibilities of trustees, provides that the trustees must consider the recommendations of the county superintendent of public instruction regarding all persons to be nominated for district supervising principals or principals of district schools and make nominations for such positions to the county board. Section 443 (1) further provides that all nominations for *reappointment* of district supervising principals or principals of district schools be submitted to the county board at least eight weeks before the close of school. Subsection (2) of said Section 443, requires the trustees to consider recommendations of the district supervising principal or the principals of the district schools and the county superintendent regarding the nomination of teachers and other members of the instructional staff and to make nominations for such positions to the county board. It is specifically provided in said Section 443 (2) that nominations for *reappointment* of members of the instructional staff should be submitted to the county board at least *six weeks* before the close of school.

We must look to Section 423 (7) (c) of the School Code, to ascertain whether there is any limitation as to the time for nominating members of the instructional staff for original appointment rather than re-appointment. It is provided in said Section (which deals with the powers and duties of the county school board) that the county school board must act not later than six weeks before the close of school during any year on the nomination by the trustees of district supervising principals or district school principals, and not later than four weeks before the close of school on the nomination by trustees of all other members of the instructional staff. It is further provided in said Section 423 (7) (c), that if the trustees do not make nominations within the time limits provided in said section, that the county board shall have the right, upon its own motion, to appoint district supervising principals or district school principals or other members of the instructional staff.

It would therefore follow that trustees are required to nominate for original appointment district supervising principals and district school principals not later than six weeks before the close of school. They are required to nominate for *reappointment* of such district supervising principals and district school principals at least eight weeks before the close of school. The trustees would be required to nominate for original appointment other members of the instructional staff within four weeks before the close of school and for *reappointment* within six weeks before the close of school.

The specific provisions of the School Code provide the time limit within which trustees may nominate members of the instructional staff of district schools. If they do not make the nominations within the time limit so provided, the county school board may proceed on its own motion to appoint members of the instructional staff of district schools.

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June 25, 1940—O-856.

CONSTRUCTION RE: DUTY OF SUPERVISOR OF REGISTRATION
REGARDING SCHOOL DISTRICT ELECTIONS—COMPEN-
SATION OF SUPERVISOR OF REGISTRATION*Dear Sir:*

There are five types of special tax school district elections provided for in the School Code. They are: (1) the regular biennial school district election; (2) elections for organizing school districts; (3) elections for consolidation of school districts; (4) elections for reorganization of districts; and (5) elections to determine whether special tax school district bonds shall be issued. You propound the following questions relating to the school elections, to which reference has been hereinabove made:

1. Are certified lists of qualified electors required to be furnished for each of these elections by the supervisor of registration upon demand?
2. Is payment required by the county board for each of these lists?
3. If payment is required, what rate of payment is expected?
4. What rate of payment is expected for lists for the regular biennial election?

Answering your first question, it is my opinion that certified lists of qualified electors are required to be furnished upon demand for each of the elections above referred to, by the supervisor of registration. This is specifically required in Subsection 2 (b) of Section 1032 of the School Code, for regular biennial elections and by Subsection 1 (e) of Section 1032 of the School Code for elections for organizing school districts. This is impliedly required for elections for consolidation of districts and elections for reorganization of districts by Section 1032 (3) and Section 1032 (4) (f) respectively, of the School Code, which adopt for said elections the procedure prescribed for regular biennial school district elections. In elections relating to the issuance of special tax school district bonds, the provisions of Chapter 14715, when not in conflict with other provisions of law, would apply. Such provisions would require the county school board to cause to be made up and certified by the proper registration officer, to-wit, the supervisor of registration, a list of names of all qualified electors who are freeholders in said district.

Answering your second question, it is my opinion that payment is required to be made to the supervisor of registration by the county school board for each of such lists.

Answering your third and fourth questions, it is my opinion that, in the absence of specific statutory provisions describing the amount of fees to be paid for making up such lists, the board of county commissioners has the authority to prescribe the compensation to be paid the supervisor of registration by the county school board, for Section 224, Revised General Statutes (Section 259, Compiled General Laws) contains the following:

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“ * * * The compensation of such supervisors shall be such sum or sums in proportion to the amount of work to be done as may be fixed and allowed by the board of county commissioners in each county respectively: Provided, that the compensation of no supervisor shall be less than one hundred dollars per annum * * *.”

July 20, 1940.—O-870.

LIMITATION ON AMOUNT WHICH CAN BE BORROWED BY
COUNTY SCHOOL BOARD UNDER SECTION 1085

Dear Sir:

Under Section 1085 of the School Code, a county school board is authorized, under certain conditions, to create obligations for purchase of school buses, insurance and land for school sites, which obligations must be retired within a period of four years. The amount to be borrowed is limited by the provisions of Subsection (2) of Section 1085 of the Florida School Code, which reads as follows:

“Obligations May Not Exceed One-fourth of County or of District Current Revenue for the Preceding Year.—No obligations of the nature prescribed herein may be incurred by any County Board when such proposed obligations exceed one-fourth of the revenue derived during the preceding year from county current school funds or from the district current school funds of the district for which the obligation is incurred.”

Subsection (5) of Section 1085 reads as follows:

“Interest Bearing Notes Authorized.—The County Board of any county for which the State Board has authorized the incurring of obligations as provided in this Section shall issue interest-bearing notes for the obligation. The notes shall provide the terms of payment, and shall not bear interest in excess of six per cent per annum. *No additional obligations of a similar nature may be incurred against the funds of any county or school district when notes authorized under this Subsection are still outstanding and unpaid, when such proposed obligations together with the unpaid notes outstanding exceed one-fourth of the revenue of the preceding year as prescribed in Subsection (2) above.*” (Italics ours.)

You request my opinion as to whether the limitation as to the amount to be borrowed of “one-fourth of the revenue derived during the preceding year * * *” means:

“(a) That the total amount to be borrowed shall not exceed one-fourth of the revenue derived during the preceding year from county current school funds or the district current school funds of the district for which the obligation is incurred, or

“(b) The amount to be retired for any one year shall not exceed one-fourth of the revenue derived during the preceding year from county current

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school funds or the district current school funds of the district for which the obligation is incurred?

It is my opinion that the borrowing limit under Section 1085 of the School Code is that which is set forth above as "(a)." It is my opinion that indebtedness incurred under Section 1085 of the School Code must not at any time exceed one-fourth of the revenue of the preceding year from county current school funds or district current school funds, depending on whether the loan is made on behalf of the county school board or a school district.

July 22, 1940—O-871.

CONSTRUCTION RE: TIME LIMITATIONS FOR NOMINATIONS
BY SPECIAL TAX SCHOOL DISTRICT TRUSTEES OF IN-
STRUCTIONAL PERSONNEL—NOMINATIONS BY
TRUSTEES WHEN ORIGINAL NOMINEE
RESIGNS

Dear Sir:

You call my attention to my opinion of June 12, relating to the time limitations prescribed by law for nominations by special tax school district trustees of principals and teachers.

In that opinion, I stated my conclusion to be that if such trustees do not make nominations within the time limit prescribed by statute, the county school board may proceed on its own motion to appoint members of the instructional staff of district schools.

You now request my opinion as to a further question which may thus be stated: When one who has been nominated by the trustees within the time prescribed by law resigns from and rejects said nomination after the time for making original nominations has passed, do the trustees have the right to make a further nomination or can the county board proceed on its own motion to make the appointment?

It is my opinion that the county school board should call for a further nomination by the trustees, which should be filed within a reasonable time to be prescribed by the county board. If the trustees do not make such nomination within a reasonable time, the county board should then proceed to make the appointment on its own motion. In my judgment, however, the intent of the law can best be served by affording the trustees an opportunity to make the nomination, since the vacancy is not chargeable to any failure on the part of the trustees to make an original nomination within the time prescribed by law.

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August 7, 1940—O-890.

COURSES OF STUDY BULLETINS—COST OF PREPARING AND
PRINTING PAYABLE FROM STATE TEXTBOOK FUND*Dear Sir:*

You call my attention to Section 748 of the Florida School Code. You request my opinion as to whether the cost and charges for State courses of study now in process of preparation are proper charges against the State Textbook Fund under the provisions of said Section 748. You state that your department now has in process of preparation a course of study bulletin for the elementary schools, a course of study bulletin for the secondary schools, a bulletin entitled "Source Units in Health Education," a commercial course of study bulletin, and materials supplementary to the secondary course of study bulletin entitled "Practical Adaptations for Industrial and Military Preparedness in the Fields of Mathematics, Science, and Shop," or a similar title.

Section 748 of the Florida School Code reads as follows:

"Section 748. Use of State Textbook Fund.—All costs and charges, either for books, *State courses of study*, supplies and equipment, packing, transportation, communication, storage, rent, travel expense, printing, and printed forms, managerial or clerical or other labor or services, or other expense necessary to effect the purchase, salvage, renovation and repair, accounting for, distribution, or exchange of textbooks, shall be proper charges against the State Textbook Fund, and shall be payable therefrom, monthly, upon presentation and recommendation to the State Board by the State Superintendent." (Italics ours.)

It is my opinion that such costs and charges are proper charges against the State Textbook Fund, as evidenced by the specific language used in the statutory provisions above set forth.

August 16, 1940—O-894.

EXCLUSIVE METHODS OF INCURRING INDEBTEDNESS FOR
SCHOOL PURPOSES—LEASE-CONTRACT PLAN OF
PURCHASING SCHOOL BUSES*Dear Sir:*

In your letter of this date you first request my opinion as to whether the methods of incurring indebtedness referred to in Section 1083 of the School Code are exclusive. Section 1083 reads as follows:

"Section 1083. Purpose of and Procedures in Incurring School Indebtedness.—Indebtedness for school purposes may be incurred only as follows:

"(1) School districts may issue bonds creating a long-term indebtedness as prescribed by law.

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"(2) Notes may be issued for money borrowed in anticipation of the receipt of current school funds included in the budget from the State, county, or districts as authorized under Section 1084 below.

"(3) Indebtedness may be incurred for certain purposes as authorized under Section 1085 below for a period not to exceed four years."

It is my opinion that indebtedness for school purposes may be incurred only as set forth in Section 1083.

You further request my opinion as to whether it would be legal for a county school board to enter into a lease-contract plan of purchasing school buses extending over a period of several years, without complying with Section 1085 of the School Code. I assume that the lease-contract plan is essentially the same as the lease-contract plan for purchase of school property which was specifically considered by me in my opinion to you of September 9, 1939. For the reasons stated therein, the county school board would not have the authority to enter into such a contract extending over a period of several years without complying with the provisions of Section 1085 of the School Code.

September 4, 1940—O-917.

MINIMUM AGE FOR ADMISSION TO FIRST GRADE

Dear Sir:

You call my attention to Section 601 of the School Code, which requires children between the ages of seven and sixteen to attend school, with certain exceptions. Section 601 authorizes the admission of pupils below the age of seven. The following are the pertinent provisions of Section 601:

"Provided, further, that a child who has attained the age of five years and nine months on or before the opening day of school of any year shall be admitted at the beginning of the school term or at any time during the first month of the school year to the first grade of any public elementary school having only annual promotions, but if any child is not so enrolled in the first grade during the first month of the school year, he shall not be admitted to the first grade until the beginning of the following school year; and provided, further, that any school having semi-annual promotions a pupil who has attained the age of five years and eleven months on or before the opening day of any semester shall be admitted at the beginning of the said semester or at any time during the first two weeks of the said semester."

You request my opinion as to whether a child who will reach the age of five years and eleven months within the first two weeks of a semester, in the case of a school having semi-annual promotions, is eligible for admission during the first two weeks of that semester.

While the literal construction of the first part of the last proviso in this section, if considered apart from the other language therein, might be construed to mean that the attainment of the age of the prospective pupil should

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be five years and eleven months on or before the opening day of any semester, the entire proviso permitting the admission of such child "at any time during the first two weeks of said semester" clearly indicates the intention of the Legislature to modify the apparent limitation contained in the first words thereof, and permits the admission of any child for whom application is made to become a pupil during the first two weeks of a semester, who attains the age of five years and eleven months during such two weeks.

It would follow, of course, upon the application of the same principles that in the case of a school having only annual promotions, a child who has attained the age of five years and nine months during the first month of the school year should be admitted to the first grade.

September 6, 1940—O-919.

COUNTY SCHOOL BOARDS NOT AUTHORIZED TO CHARGE
TUITION WHEN PARENTS ARE BONA FIDE
RESIDENTS OF FLORIDA

Dear Sir:

Section 216 (2) of the School Code, reads in part, as follows:

"No matriculation or tuition fees shall be charged pupils whose parents are bona fide residents of this State."

You request my opinion with regard to the meaning of the words "bona fide residents" appearing in the above statutory provision. You propound three specific inquiries, as follows:

1st. What is the test of residence entitling one to the facilities of the public free schools without pay?

2nd. A person is not entitled to vote in this county unless he has been a resident of the State for twelve months and a resident of the county for six months. Can that test be applied to residence for school purposes? In other words, can the school board say that a person is not entitled to have free access to the public schools until they have been a resident of the State for twelve months and a resident of the county for six months?

3rd. Some of the tourists have winter homes here and pay taxes and live in their homes a few months during each season, and after the season closes they leave for the balance of the year. Are such tourists deemed as residents entitling them to the free use of the public schools or is something more required?

It is my opinion that the Legislature did not intend the words "bona fide residents" to be the equivalent of the term "citizens" or to apply only to persons domiciled in Florida. I refer to the case of *Robinson v. Fix*, 151 So. Rep. 512, in which the Supreme Court of Florida decided that one who resides in the State of Florida five months during the year is a "resident" of Florida during that time. I do not think that it was the intent of the Legislature to require persons to reside in the State long enough to be eligible to vote in

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order to send their children to the public schools without being required to pay tuition.

It is my opinion that winter residents of Florida who own homes in this State, in which they live during part of the year, and upon which they pay taxes, are entitled within the intent of the School Code, to send their children to the public schools of Florida without paying tuition.

October 11, 1940—O-954.

CHAPTER 19355, ACTS OF 1939, REPEALS CHAPTER 19336

Dear Sir:

You state that Chapter 19356 and Chapter 19355, Laws of Florida, Acts of 1939, became laws without the approval of the Governor, and that both were filed in your office on the same date.

You state that Nassau County is the only county which falls within the population bracket prescribed by Chapter 19336, and you request my opinion as to which of the above mentioned statutes govern in Nassau County.

It is my opinion that under the circumstances above set forth, Chapter 19355 (which is the School Code) is to govern in the event of a conflict. I think that this would be in accordance with the legislative intent, particularly in view of Section 106 of Chapter 19355, which repeals all laws, general, special and local, with exceptions noted therein.

An additional reason for this conclusion is that Chapter 19336 was undoubtedly a special Act, and was not advertised in accordance with constitutional requirements.

December 27, 1940—O-1024.

**AMOUNT OF OFFICIAL BONDS OF COUNTY SUPERINTENDENTS
AND CHAIRMEN OF COUNTY SCHOOL BOARDS—SEC.
1089 (1) AND (2) OF SCHOOL CODE**

Dear Sir:

You call my attention to Subsections (1) and (2) of Section 1089 of the School Code, which prescribe the amounts of the official bonds of county superintendents of public instruction and chairmen of the county school boards. The amounts of such official bonds are to be determined as follows: In counties in which the annual receipts are less than \$100,000.00 such official bonds should not be less than \$2,000.00; in counties in which the annual receipts exceed \$100,000.00, but are less than \$500,000.0, the official bonds are in the amount of \$5,000.00; and the counties in which the annual receipts are \$500,000.00 or more the official bonds are in the amount of \$10,000.00. You request my opinion as to whether cash on hand at the end of the preceding year is to be included as "annual receipts" in determining the amounts of official bonds of such officers in particular cases.

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It is my opinion that cash on hand at the end of the preceding year is not included within the term "annual receipts" in computing the amount of the official bonds of county superintendents and chairmen of county school boards. Section 1089 (1) and (2) provides for the classification of counties in accordance with the "annual receipts" insofar as the amounts of the official bonds of such officers are concerned. To include cash on hand at the end of the preceding year would be to include the same receipts twice in some counties (once in the year in which the cash was received and again in the year in which it is carried over), which could result in throwing out of balance the system of legislative classification to which reference is above made.

December 28, 1940—O-1017.

USE OF VOTING MACHINES IN ELECTIONS UNDER SCHOOL
CODE—SECTION 211 OF SCHOOL CODE DOES NOT
CONFLICT WITH SECTION 2 OF CHAP-
TER 18405, ACTS OF 1937

Dear Sir:

You call my attention to Section 211 of the Florida School Code, which reads as follows:

"Section 211. When Voting Machines May Be Used in School Elections.—Whenever voting machines are authorized to be used in general or primary elections in any county, the county board may, in its discretion, require such machines to be used in any other elections provided for under the School Code."

You also call my attention to Section 2, Chapter 18405, Acts of 1937, relating to the use of voting machines. Section 2 of Chapter 18405 provides that, when a county or municipality votes, as therein prescribed, to use voting machines, such machines shall be used "* * * at any and all elections held in such county or municipality or any part thereof * * *." You request my opinion with regard to whether the use of voting machines in elections held under the School Code is a matter within the discretion of the county board in view of the provisions of Section 2 of Chapter 18405, which would appear to mandatorily require the use of such machines.

It is my opinion that the determination of this matter rests, under Section 211 of the School Code, in the discretion of the county board. This statute was passed subsequent to the enactment of Chapter 18405, and if there is any conflict, the provisions of said Section 211 must govern. It would seem, however, that there is not necessarily any conflict because the elections referred to in Chapter 18405 are those held under the supervision of boards of county commissioners or the governing boards of municipalities. Chapter 18405, therefore, would not apply to elections held under the supervision of the county school board, except to the extent provided in Section 211 of the School Code.

SCHOOLS — School Code

December 28, 1940—O-1018.

SCHOOLS—FILING OF OFFICIAL BONDS OF SCHOOL OFFICIALS
WITH THE BOARD OF COUNTY COMMISSIONERS—
SECTION 1089 (6) OF THE SCHOOL CODE*Dear Sir:*

You call my attention to the fact that, prior to the enactment of the School Code by the Legislature of 1939, the law required bonds of members of the county school boards to be filed with you, as Secretary of State. You request my opinion as to whether such official bonds are to be filed with you under Section 1568, Revised General Statutes (Sec. 2416, Compiled General Laws) which applies to all county officers, or whether such official bonds are to be filed with the boards of county commissioners of the respective counties.

It would seem that there is a conflict between said Section 1568, Revised General Statutes, and Section 1089 (6) of the School Code. Since the School Code was adopted subsequent to said Section 1568, it must govern to the extent to which it is inconsistent with the earlier law.

It is, therefore, my opinion that bonds required of school officials under Section 1089 of the School Code must be filed with the boards of county commissioners of the respective counties.

November 21, 1940—O-1020.

AUTHORITY OF COUNTY SCHOOL BOARD TO OBTAIN LONG-
TIME LEASE ON LAND FOR SCHOOL SITE*Dear Sir:*

You submit for my consideration substantially the following factual situation: The County School Board of Monroe County has been attempting to purchase a three-acre site at Marathon for the purpose of building a school thereon. The owner of the land, the Over-Seas Road and Toll Bridge District, is prohibited by an agreement it has with Reconstruction Finance Corporation from conveying a fee simple title to the property. It has been proposed that the county school board obtain a long-time lease on the property and erect a school thereon. You request my opinion with regard to whether the county school board would be legally authorized to construct a school building on property in which the county board has only such a leasehold interest.

While it is undoubtedly the best policy for the county school board to acquire the fee simple title to lands upon which it erects school buildings, the circumstances hereinabove set forth would authorize the school board to construct a building on property leased by the board. The term of the lease should be sufficiently long to guarantee that the school board has the use of the

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property during the life of the building to be erected. This conclusion is supported by Section 905 of the School Code, which recognizes the right of the county board to acquire by eminent domain an estate less than fee simple in property needed for school purposes.

SECTION 2

Schools—School Teachers

April 17, 1939—O-156.

BENEFITS UNDER RETIREMENT LAW—CHAPTER 19014

Dear Sir:

As Chairman of the Senate Committee on Education, you request my opinion as to what classes of persons are proposed to be eligible to qualify as "members" to draw "benefits" under the Teachers' Retirement Bill now pending before the Senate.

In Subsection (5) of Section 1 I find the following definition:

"'Member' shall mean any person included in the membership of the retirement system as provided in Section 5 of this Act."

Section 5, relating to "membership," reads as follows:

"(1) The membership of the retirement system shall consist of the following:

(a) All persons who become *teachers* or who re-enter service on or after the first day of July, nineteen hundred and thirty-seven, shall become members of the retirement system by virtue of their appointment as teachers.

(b) All persons who were *teachers* at any time during the school year of nineteen hundred and thirtysix-nineteen hundred and thirty-seven, shall become members as of July 1st, A. D. 1937 unless, prior to November first next following, any such teacher shall file with the Board of Trustees on a form prescribed by such board a notice of his election not to be covered in the membership of the retirement system and a duly executed waiver of all present and prospective benefits which would otherwise inure to him on account of his participation in the retirement system.

(2) A *teacher* whose membership in the retirement system is contingent on his own election and who elects not to become a member may thereafter apply for and be admitted to membership, but no such teacher shall receive prior service credit unless he is admitted to membership as of a date before the first day of July, nineteen hundred and thirty-eight.

(3) The membership of any person in the retirement system shall cease if he shall be continuously unemployed as a *teacher* for a period of more than two years; or if in any five-year period after he last became a member he shall render less than three years of service as a teacher; or upon the withdrawal by a member of his accumulated contributions as provided in Subsection (6) of Section 7 of this Act; or upon retirement or upon death.

(4) The Board of Trustees may in its discretion deny the right to become members to any class of *teachers* who are serving on a temporary or any other than a per annum basis, and it may also in its discretion make

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optional with members in any such class their *individual entrance into membership.*" (Italics ours.)

It is to be noted that all the classes of "membership" hereinabove defined specifically include *only teachers.* Returning to subsection (4) of Section 1. the word "teacher" is defined as follows:

"'Teacher' shall mean any *teacher employed by a county board of public instruction* in the public free schools. In all cases of doubt the Board of Trustees shall determine whether any person is a teacher as defined in this Act." (Italics ours.)

To begin with, in common usage the word "teacher" plainly refers to one who imparts knowledge to and instructs others." Therefore employees in the school system not engaged in activities directly associated with instruction, even though employed by a county board of public instruction, would not be "members" within the provisions of the Teachers' Retirement Bill. This would exclude from "membership" such employees as bus drivers, janitors and strictly clerical and administrative officers and assistants.

All persons engaged as instructors, however, are not "members." The test is whether they were "employed by a county board of public instruction." Thus professors and other teachers employed by the State Board of Control, State Board of Education and other instrumentalities of the State would not be eligible for "membership."

The conclusion is evident, since only "members" may participate in the "benefits" that such benefits are payable only to the class of persons hereinabove considered.

May 23, 1939—O-293.

STATE BOARD OF EDUCATION CANNOT CHANGE REQUIRE-
MENTS OF LAW RELATING TO LIFE STATE
TEACHERS' CERTIFICATES

Gentlemen:

You have submitted for my consideration the file relating to the application of Mr. C. Lindsey for a life State certificate under Section 15 of Chapter 9122, Laws of Florida, Acts of 1923, as amended by Section 2 of Chapter 10244, Laws of Florida, Acts of 1925, the same being Section 644, Compiled General Laws, 1927.

It seems that Mr. Lindsey cannot comply with the requirements set forth in said Section 644, Compiled General Laws, 1927, by reason of the fact that he did not have twenty-four months teaching experience. He calls the attention of the Board to the fact that he was prevented from getting this experience by reason of physical disability.

It is my opinion that the State Board of Education has no legal authority to grant a life State certificate to Mr. Lindsey, in the absence of a showing

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that the statutory requirements have been met. The Legislature has seen fit to prescribe definite requirements, which the State Board of Education is without power to suspend or modify.

August 4, 1939—O-513.

NOMINATION BY TRUSTEES CAN BE REJECTED
ONLY FOR CAUSE

Dear Sir:

You request my opinion with regard to substantially the following state of facts: The board of trustees of a special tax school district has nominated a certain person for appointment as teacher in a school of that district. The county board of public instruction has rejected this nomination. It would seem that the reason stated for rejecting the nomination was not that the person nominated was lacking in the requisite qualifications, but that the person who has been occupying the particular teaching position involved is entirely fit and qualified to continue in that position. You request my opinion as to whether, as a matter of law, this reason would be a sufficient one to authorize the county board of public instruction to reject nomination of the board of trustees.

It is my opinion that the reason so assigned is not sufficient. The following is from the opinion of the Supreme Court of Florida, in the case of *State ex rel. Carter v. Platt*, 179 So. 408:

"(1) Under the law of this State, the power to nominate teachers for the public schools is vested in the board of trustees of the special tax school districts and it becomes the duty of the board of public instruction to appoint those so nominated if they are legally, morally, and professionally qualified and no legal cause is shown for their rejection. *State ex rel. Pittman v. Barker, et al.*, 118 Fla. 380, 160 So. 362, and cases cited."

The School Code, enacted at the 1939 session of the Florida Legislature, has not changed in any material respect the authority of the board of trustees to nominate teachers. See Section 443 (2) of the School Code.

In counties where teachers' tenure laws are not in effect, county boards of public instruction must appoint the nominee of the board of trustees, unless that particular nominee is lacking in the proper qualifications. If the county board could refuse to accept the nomination of the trustees for the reason that they consider some other person better qualified, the inevitable result would be that the power of the trustees to make nominations would be reduced to an idle gesture.

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September 9, 1939—O-564.

SALARY FUND—REPAYMENT OF LOANS AGAINST—PAYMENT
OF SALARIES DUE FOR PREVIOUS YEAR*Dear Sir:*

You request my opinion with regard to a number of questions relating to the State Teachers Salary Fund. I shall separately consider the questions propounded.

First Question:

Section 1084, Subsection (1) of Chapter 19355, Acts of 1939 authorizes a current loan of not exceeding 90% of the amount of revenue reasonably expected to be received from the apportionment to the county from the State Teachers Salary Fund. If this apportionment should not be paid in full during the current fiscal year, could part of the apportionment made during the next fiscal year be used to repay any current loan properly executed as provided in this subsection?

My answer to this question is in the affirmative. It seems to me that this matter is settled by the following language of Section 1077 of the School Code:

"The budget when finally adopted shall give the appropriations and reserves therein the force and effect of fixed appropriations and reserves and the same shall not be altered or amended or exceeded except as authorized herein: Provided that should the actual receipts during any year be less than budgeted receipts, and any obligations are thereby incurred which cannot be met before the close of the year, such obligations shall be included in the budget for the next year as an appropriation for the payment of indebtedness of the previous year." (Italics ours.)

Second and Third Questions:

(A) (Second Question): May the Teachers Salary Fund be used for paying salaries due for the previous year because of any failure of the State to pay in full during any year its apportionment of the Teachers Salary Fund?

(B) (Third Question): May the Teachers Salary Fund be used in any county to pay salaries of teachers incurred during the previous year which were budgeted to have been paid from local revenues but which could not be paid because local funds anticipated for that purpose were not received?

In connection with the second and third questions, you call my attention to that provision of Section 1012 of the School Code, which provides, "No warrant shall be drawn against the instructional salary portion of the Teachers Salary Fund allotted to any county save and except for the purpose of paying the salaries of properly certificated instructional personnel under contract in the public schools of such county during the current school year *or for the previous year as prescribed by law * * **" In answering the first question, I called attention to Section 1077 of the School Code. The provisions which I quoted from that section are applicable to the determination of the second and

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third questions. In my opinion the second question should be answered in the affirmative. When debts are lawfully incurred for teachers salaries and are not paid during the current school year by reason of the failure of the State to pay in full for that year its apportionment of the Teachers Salary Fund, said debts carried over may be budgeted as a proper expenditure during the next year from the Teachers Salary Fund, unless the provisions of Chapter 19001, the Parity Act, are invoked.

It is my opinion that the third question should be answered in the negative. When receipts from local revenues do not equal the amounts estimated in the budget, the deficiency should not be made up out of the State funds for the next year. To so hold could result in the serious impairment of the State Teachers Salary Fund, which would be contrary to the intent and the provisions of the School Code setting up the budget system.

Fourth Question:

May the State Teachers Salary Fund ever be anticipated and pledged by a county beyond the current year other than as may be indicated in the opinions in answer to the questions above? For example, may a county purchase buses or incur any similar obligation and pledge anticipated revenue from any portion of the State Teachers Salary Fund to retire those obligations?

The fourth question, in my opinion, should be answered in the affirmative. That part of the Teachers Salary Fund which, under the law, can be expended for transportation purposes can be taken into consideration, in formulating a "plan of payment" of obligations incurred under Section 1085 for the "purchase of school buses for transportation of pupils." The requirements set forth in Section 1085 of the School Code would, however, have to be fully met.

November 2, 1939.—O-634.

**RETIREMENT SYSTEM—CONTRIBUTIONS BEGINNING
DECEMBER 1, 1939**

Dear Sir:

This is in reply to your letter of October 26, in which you state that the Board of Trustees of the Teacher Retirement System, pursuant to Section 3 of Chapter 19014, Acts of 1939, adopted a motion to the effect that the Teacher Retirement System shall become effective December 1, rather than July 1, 1939, and that contributions by teachers be deducted beginning December 1, 1939, subject to the legality of such action being approved by the Attorney General.

Section 11 (a) provides that each employer shall cause to be deducted from the salaries of members of the Teacher Retirement System the contribution payable by such member for each and every payroll subsequent to July 1, 1939. As I understand it, due to certain administrative problems which confront the Board of Trustees, such deductions have not been made. In order

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to promote uniformity in administration of the Act, the Board of Trustees determined to begin the deduction of such contributions as of December 1, 1939.

It is my opinion that this action taken by the Board is legal. The duties imposed under the statute are continuing in nature. If, for practical reasons, contributions could not be deducted beginning July 1, 1939, the Act could be construed as authorizing the deduction of contributions to begin as of a later date.

January 30, 1940—O-715.

**EMPLOYMENT OF SUBSTITUTE AND TEMPORARY TEACHERS
WITHOUT NOMINATION BY TRUSTEES**

Dear Sir:

You request my opinion with regard to substantially the following state of facts:

In some of the more populous South Florida counties, the school enrollment greatly increases during the winter tourist season. This makes it necessary to employ additional teachers on a temporary basis. In fact, such employment is on a day-by-day basis rather than on a monthly or annual basis. Very often there will be an immediate need for eight or ten teachers in possibly that many special tax school districts. To keep the school system operating efficiently, these teachers must be promptly assigned and there is no time for contacting trustees of the various districts with regard to the appointment of such temporary teachers. In the particular county concerning which you inquire, the temporary teachers are paid exclusively from either the general county school funds or from the State teachers' salary fund and no special tax school district funds are used for this purpose. The question presented is whether the County Board of Public Instruction can legally provide for the employment of such temporary teachers without securing the nomination of same by Special Tax School District Trustees.

Under Section 443 of the School Code, the trustees of special tax school districts nominate members of the instructional staff to serve in the district schools. Under Section 423 (c) of the School Code, the appointment of members of the instructional staff in district schools is made by the County Board of Public Instruction after nomination by the trustees, as aforesaid. It is clear from a consideration of the provisions of the School Code, to which reference has hereinabove been made, that they were intended to apply to the appointment of permanent rather than temporary teachers.

It is my opinion that the county board of public instruction, in exercising its general authority to see that adequate educational facilities are provided in the public schools for all children of school age in the county (see Section 423 [6] [b] of School Code), can provide for the appointment of temporary

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teachers under the conditions hereinabove set forth, without first obtaining nominations from trustees.

February 27, 1940—O-742.

QUALIFICATIONS—AUTHORITY OF COUNTY BOARDS

Dear Sir:

You request my opinion with regard to several questions relating to the qualifications of teachers. The first question is as follows:

"1. Would a county board have a legal right to prescribe that no new teacher or other instructional employee is to be appointed who has had less than two years of training in a standard institution of higher learning?"

It is my opinion that the above question should be answered in the affirmative. The authority of the county school board to prescribe qualifications for teachers is derived from Section 504 of the Florida School Code:

"Section 504. County Board May Prescribe Qualifications.—The County Board of any County may, *in addition to and not inconsistent with* qualifications prescribed by law or by regulations of the State Board, prescribe those qualifications for any or all positions which, in the opinion of the County Board, will best promote progress in the public school system of the county." (Italics ours.)

Additional authority for the county school board to prescribe qualifications for teachers is contained in Section 423, Subsection (7) of the Florida School Code which authorizes the county school board to "designate positions to be filled, prescribe qualifications for those positions * * *."

You further request my opinion with regard to substantially the following:

If the county school board has prescribed minimum qualifications for instructional employees, are the trustees of the various school districts required to recommend for positions as teachers or other instructional employees persons having such qualifications?

It necessarily follows that the trustees must nominate persons possessing the qualifications required by regulations of the County School Board. If this were not true, the power conferred upon the county school board to prescribe qualifications for instructional employees could be completely nullified.

You further request my opinion as to what steps should be taken by county boards in the appointment of teachers in district schools in the event the trustees of said school district recommend for appointment only persons who do not possess the qualifications in the matter of training prescribed by the board. It is my opinion that such nominations may be rejected by the county school board pursuant to the following provisions of Section 423 (7) of the School Code:

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"The County Board shall have the right to reject, but only for good cause, any district supervising principal, principal, or other member of the instructional staff nominated, and, in case the second nomination by the trustees for any such position be rejected, the said county board shall then proceed on its own motion to fill such position."

In other words, the failure of a nominee of the trustees to possess the qualifications prescribed by the county school board would be good legal cause for rejecting the nomination of that person. If the first nomination is rejected, the trustees have a right to make another nomination. If the second nomination is also rejected on the same ground or for any other good cause, the county board may then proceed to fill the position on its own motion.

September 11, 1940—O-923.

WHEN ALIENS ELIGIBLE TO BE EMPLOYED IN THE PUBLIC
SCHOOL SYSTEM OF THIS STATE

Dear Sir:

I am in receipt of your letter of September 11, together with enclosures, in which it is stated that a supervising principal of one of the schools in this State was born of Swiss and Scotch parentage in Canada; that he has lived in this country since he was six months old and his father had taken out citizenship papers but that he was unable to produce proof that his father ever received his final papers, and because of this fact the charge has been made that he is not a citizen of the United States, and therefore is not eligible for employment in the public schools of this State although he received his graduate State certificate in 1928 and his life graduate State certificate in 1933, and you request my opinion, under the above stated facts, as to whether or not this principal is eligible for employment on the basis of his life certificate which was issued in 1933.

I am unable to find anything in the statute law of this State or in the common law of this country which would prohibit the employment of an alien in the public school system of this State prior to the adoption of Chapter 19355, Laws of Florida, 1939, and the only prohibition found there is in Section 517, which, in part, is as follows:

"The State Superintendent shall issue, in accordance with State Board regulations, a certificate of the proper type to any person possessing the qualifications for such a certificate as prescribed herein, and by rules and regulations of the State Board, who pays the required fee, makes application in writing on the form prescribed by the State Superintendent, submits satisfactory evidence that he possesses said qualifications, and who meets the requirements given in Section 518 of the School Code. *To be eligible for a certificate to serve in an administrative or instructional capacity, the applicant shall be at least eighteen years of age, shall be a citizen of the United States,*

* * *

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However, Section 514 of the same law provides as follows:

"No person shall be employed to serve in an administrative or instructional capacity as a regular, part-time, or substitute employee in the public schools of the State who does not hold a valid certificate granted or recognized pursuant to law and to regulations of the State Board; nor shall any County Board employ, contract with, or pay any person a salary for administrative or instructional services who does not hold such a valid certificate: *Provided that no certificate issued under the laws of the State since A. D. 1894 shall be rendered invalid thereby.*"

It is my opinion that that part of Section 517 above quoted requiring an applicant to be a citizen before he is eligible to receive a certificate applies only to applicants who apply for certificates after the 1939 law became effective, since under Section 514 nothing in the 1939 law invalidates any certificate issued under the laws of the State since 1894, and therefore, I am of the opinion that this principal is eligible for employment on the basis of his life certificate issued in 1933, regardless of the fact that he might be an alien.

September 20, 1940—O-930.

JEWISH TEACHERS—"PERSONAL LEAVE" OF ABSENCE UNDER SECTION 543 BY REASON OF RELIGIOUS HOLIDAYS

Dear Sir:

You request my opinion with regard to whether Jewish teachers in the public schools of Florida can obtain leave of absence on the two religious holidays known as the New Year and the Day of Atonement and, further, whether such leave of absence should be with or without pay.

It would appear that these questions are governed by Section 543 of the School Code, which reads as follows:

"Section 543.—Personal Leave.—The County Board of each county shall adopt regulations prescribing conditions under which members of the instructional staff shall be granted leave of absence for personal reasons. Any such leave of absence shall be approved by the County Superintendent, subject to regulations of the County Board. Any member of the instructional staff who is absent for personal reasons shall not be entitled to pay while absent."

Under Section 543, it would seem that a county board of public instruction can, and should, provide for leaves of absence to Jewish teachers on the religious holidays above named. Such leaves of absence, however, are for reasons personal to the teachers, and therefore such teachers would not be entitled to pay while so absent.

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September 21, 1940—O-932.

**TEACHERS' RETIREMENT SYSTEM—ELIGIBILITY FOR
PRIOR SERVICE CREDIT***Gentlemen:*

You request my opinion with regard to substantially the following state of facts: A teacher who has taught in the public schools of Florida during the school years 1936-37, 1937-38, and 1938-39, but who was not employed during the school year 1939-40 and has made no contribution to the Retirement System, seeks at this time to obtain a certificate of prior service credit, pursuant to Section 557 of the School Code. This particular teacher did not file a notice of election prior to December 1, 1939, not to become a member of the Retirement System, pursuant to Section 556 (1) (a) of the School Code.

It would appear that by reason of not filing a notice of election not to become a member of the Retirement System, that the teacher automatically became such a member. See Section 556 of the School Code. Upon filing application disclosing information required by the board of trustees, the teacher is entitled to a prior service certificate, which will entitle the teacher to benefits under the Teachers' Retirement System.

SECTION 3

Schools — Special Tax School Districts

February 17, 1939—O-49.

EXPENDITURE OF FUNDS FOR BAND UNIFORMS
NOT AUTHORIZED*Dear Sir:*

You submit for my consideration a letter addressed to you from Mr. James T. Wilson, Superintendent of Public Instruction of Dade County.

You request my opinion as to whether an expenditure of money from the funds of Special Tax School District No. 14 of Dade County for band uniforms for Miami Beach High School would be proper. I call your attention to Article XII, Section 11, of the Florida Constitution, which reads as follows:

"Section 11: Any incorporated town or city may constitute a School District. The fund raised by Section Ten may be expended in the district where levied for building or repairing school houses, for the purchase of school libraries and text-books, for salaries of teachers, or for other *educational* purposes, so that the distribution among all the schools of the district be equitable." (*Italics ours.*)

The following is from the opinion of the Supreme Court of Florida in the case of Board of Public Instruction of Okaloosa County v. Kennedy, 147 So. 250, Text page 251:

"In a long series of cases decided by this Court it has been held that school funds authorized by Article XII of the State Constitution have been segregated by organic law from general county funds, and must be raised and expended for the distinct purpose only, of maintenance and support of the public free schools, and that no authority can be given by general or special law to divert school funds, or any part of them, from the particular objects specified in the Constitution. * * *"

It is my opinion that the expenditure of school funds for band uniforms would be for a purpose not contemplated by the constitutional provision hereinabove set forth.

February 21, 1939—O-63.

PAYMENT OF TAXES AS PREREQUISITE TO VOTING—SECTION
706, COMPILED GENERAL LAWS*Dear Sir:*

You request my opinion as to whether persons must pay a tax on real or personal property for the year 1938, in order to participate in a special tax school district election to be held in March, 1939.

SCHOOLS — Special Tax School Districts

I call your attention to Section 706, Compiled General Laws of Florida, which reads as follows:

"706. Election.—All special tax school district elections shall be held and conducted in the manner prescribed by law for holding general elections, except as provided in this Article, and it is hereby made the duty of the supervisor of registration of any county, to furnish upon payment for such services to the county board of public instruction, on demand, a certified list of the qualified voters residing in a special tax school district, or the territory to be created into a special tax school district, that have paid a tax on personal or real property *for the year next preceding any such special tax election.*" (Italics ours...

Since it is clear that the list referred to in Section 706, Compiled General Laws of Florida, was intended by the Legislature to be the list of those qualified to participate in a particular special tax school district election, it necessarily follows that payment of a tax on personal or real property for the year next preceding the election is a prerequisite to voting in such election. The year next preceding the election to be held in March, 1939, is, of course, 1938.

April 5, 1939.—O-151.

PROCEDURE WHEN TIE VOTE IN ELECTION FOR TRUSTEES—
SECTION 347, C. G. L.

Dear Sir:

You request my opinion as to the proper procedure to be followed when an election of trustees in a special tax school district results in a tie vote. Trustees are elected under the provisions of Section 708, Compiled General Laws (Section 567, Revised General Statutes).

I call your attention to Section 347, Compiled General Laws (Section 291, Revised General Statutes), relating generally to the election of officers, which reads as follows:

"The person who shall receive the highest number of votes cast for one office shall be elected to such office. In case two or more persons shall receive an equal and the highest number of votes for the same office, another election therefor shall be held upon the order of the Governor as in other cases of special elections, (Id., 65.)"

In view of the fact that the above statutory provision is general in scope it would seem to be applicable to the situation to which you refer.

SCHOOLS — Special Tax School Districts

June 14, 1939—O-325.

**BONDS WITH ACCRUED INTEREST COUPONS MAY BE USED
TO PAY DEBTS***Dear Sir:*

You request my opinion with regard to substantially the following state of facts: An issue of special tax school district bonds was authorized for certain purposes. One of the contractors engaged on the project has agreed to accept bonds in lieu of cash in payment of his claim. Since the bonds are in the denomination of \$1,500.00 each, and since the claim of the contractor exceeds the amount that could be paid him in bonds by several hundred dollars, it is proposed that he retain matured interest coupons on said bonds for an amount equal to the balance due him. In other words, the bonds were authorized and printed possibly several years ago and have interest coupons attached for that period of time elapsing between the date of the bonds and the present.

The board of public instruction would undoubtedly have the authority to sell the bonds with coupons attached for par and accrued interest. There is no essential difference between doing this and using the coupons in the manner suggested.

It is, therefore, my opinion that the county board of public instruction would have the authority to deliver the bonds with accrued interest coupons to the contractor in payment of his claim.

July 27, 1939—O-502.

**CLERK CIRCUIT COURT, SUMTER COUNTY, REQUIRED TO
CANCEL AND DELIVER COUPONS***Dear Sir:*

I am in receipt of your letter of the 20th, in which you state that Chapter 20146, Laws of Florida, Acts of 1939, requires the Clerk of the Circuit Court of Sumter County, Florida, to cancel and deliver to the Board of Public Instruction of that county all bonds of any special tax school district in said county which are held by the clerk under the provisions of the Futch Act, and in which you inquire my opinion as to whether or not the clerk of said court may be required to cancel and deliver coupons of any special tax school district bonds which are not held by him under the provisions of the Futch Act. Chapter 20146 in part provides as follows:

"That the Clerk of the Circuit Court of Sumter County, Florida, is hereby authorized and required to forthwith cancel and deliver to the Board of Public Instruction of Sumter County, State of Florida, all bonds now held by said clerk under the provisions of Chapter 16252, Acts of 1933, which said bonds have been accepted by said clerk in tax payments."

Under the Futch Act the clerks of the court were allowed to receive

SCHOOLS — Special Tax School Districts

either bonds or coupons in the payment of taxes. While the statute directs the clerk to transfer bonds and not coupons, I am of the opinion that it was the intent and purpose of the Legislature to require the clerk to cancel and deliver to the board of public instruction not only bonds but also coupons received in payment of delinquent taxes. In this connection see *Park v. Candler*, 40 S. E. 523, where the words "bonded debt" were construed to include the interest on the debt.

This opinion does not pass upon the constitutionality of Chapter 20146 and is expressly made subject to the constitutionality of the Act

August 5, 1939—O-508.

CONSOLIDATION OF DISTRICTS—COURT ONLY HAS RIGHT TO PASS UPON QUALIFICATIONS OF ELECTORS

Dear Sir:

This is in reply to your letter of July 26, in which you submit substantially the following problem:

An election was held in Special Tax School Districts 9 and 10 of Sarasota County, for the purpose of consolidating those districts. On the face of the returns of this election, consolidation failed to carry in District 9 by reason of the fact that there were two votes in favor of consolidation and two against. It would seem that two persons, not properly qualified to vote in District 9 voted in that district and caused the tie vote.

You request my opinion as to whether the county board of public instruction should exclude the two illegal votes in District 9 and should ascertain by affidavits the manner in which the two qualified electors voted, or whether the election should be declared illegal.

Under Section 1032 (4) (i) of the School Code, enacted at the 1939 session of the Florida Legislature, the county board of public instruction performs the duties of a board of canvassers in elections for consolidation of special tax school districts.

I call your attention to the first headnote in the case of *State v. McLin*, 16 Fla. 17, which reads as follows:

"1. Whether a vote cast at an election was legally cast, or whether an election held on the day appointed of which due return is made to the Board of State Canvassers was a legal election, are judicial questions which the State Board of Canvassers of elections cannot determine. The general power and duty of this Board is to ascertain and declare who received the majority of votes cast. This is a ministerial duty, and its exercise may be controlled by mandamus."

I further call your attention to the fifth headnote in the case of *State v. Alachua County Canvassers*, 17 Fla. 9:

"5. County canvassers cannot look beyond the inspectors' returns except to

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determine their genuineness as being signed by inspectors appointed or elected as such of the precinct. Ballots found in a ballot-box cannot be considered by the county canvassers."

From the authorities above cited, it would seem that the board of public instruction, acting as a board of canvassers would have no right to pass upon the qualifications of electors who actually voted. The board must declare the results of the election based upon the return of the officials serving on the election board. Only the courts could go behind the election and determine the questions here sought to be presented to the county board.

October 19, 1940—O-962.

REMOVAL OF TRUSTEES BY STATE BOARD
OF EDUCATION

Dear Sir:

This is in reply to your letter of October 18, in which you request my advice concerning the proper procedure to be followed with regard to a petition which has been filed with you as Secretary of the State Board of Education, seeking the removal of two of the trustees of Special Tax School District No. 53 of Hillsborough County.

In this connection, I call your attention to Section 308 (15) of the School Code, which provides as follows:

"(15) Removal from Office. To remove from office for cause any person appointed by the State Board under the provisions of the School Code, and any trustee. Cause for such removal shall be incompetency, immorality, misconduct in office, gross insubordination, or wilful neglect of duty. The charges against any such person shall be made known to him in writing through the State Superintendent, and the person against whom charges are preferred shall be given, on not less than ten days' notice of the time and place of the hearing by the State Board an opportunity to be heard in his own defense in person or by counsel."

It would be my suggestion that you have the petitioners send you an extra copy of the petition to be served on the trustees. The State Board could then enter an order directing the trustees to file a written answer to the petition or at least to those parts of the petition which sufficiently charge grounds for removal.

SECTION 4

Schools — Miscellaneous

July 9, 1940—O-863.

AUTHORITY OF COUNTY BOARD OF PUBLIC INSTRUCTION TO
SELL BONDS*Dear Sir:*

This is in reply to your letter of June 27, which reads as follows:

"Please give me your opinion as to:

"(1) Whether or not the County Board of Public Instruction of a given Florida county can legally sell the bonds received by them from the Clerk of the Circuit Court or the County Commissioners, said bonds having been taken in under the 'Futch Act' in payment of taxes?

"(2) If said bonds can legally be sold, can the County School Board anticipate the receipts from the sale of said bonds in the 1940-41 school budget?"

With your letter is one from C. A. Boswell, Jr., attorney for the Board of Public Instruction of Polk County, from which it appears that the Circuit Court has, by mandamus proceedings, ordered the county commissioners and the clerk to deliver certain bonds taken for taxes under Chapter 16252, Acts of 1933 (Futch Act), to the board of public instruction. Thus it appears that distribution has been made by the county commissioners pursuant to Section 7 of the Futch Act.

If, in the adjustment of accounts, an interest and sinking fund of a particular bond issue receives bonds of that issue, I assume that it is not the intention of the board of public instruction to sell such bonds, and hence do not pass upon their authority to do so. I am of the opinion that bonds credited to the accounts such as the Maintenance Account and the General County School Fund, may be sold and the proceeds placed in the respective accounts. See my opinion of September 10, 1938, at page 394 of the 1937-1938 Attorney General's Report; also my opinion of August 25, 1939, in re: Investment of funds accepted and distributed under the Futch Act—Hillsborough County.

Having power to make the sale, I am of the opinion that the board is also authorized to anticipate the receipts thereof in making up its budget.

April 11, 1939—O-144.

AUTHORITY OF COUNTY SCHOOL BOARD TO LEASE A
BUILDING FOR SCHOOL PURPOSES*Dear Sir:*

You request my opinion as to whether or not a county school board could

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legally enter into a lease for property to be used for school class rooms, said lease to be for a term of years.

I call your attention to Section 561, Compiled General Laws of Florida (Section 454, Revised General Statutes.) In the fifth paragraph of Section 561, Compiled General Laws the board of public instruction is directed "To do whatever is necessary with regard to purchasing or renting school sites and premises * * *." Your particular attention is called to the words "whatever is necessary."

Under the provision of law hereinabove set forth the county school board has discretionary authority to enter into a lease for school premises. In entering into such a lease, however, the county school board is limited to doing whatever is necessary, and would not be authorized to enter into the lease for a term of years that would not be reasonably necessary. It is for the county board to determine, from the facts and circumstances of each case, whether a lease for a term of years is necessary or whether a lease from year to year would suffice.

October 2, 1940—O-946.

COMPUTING COMPENSATION OF COUNTY SUPERINTENDENTS
OF PUBLIC INSTRUCTION UNDER CHAPTER 17862, ACTS 1937

Gentlemen:

You call my attention to Chapter 17862, Laws of Florida, Acts of 1937, the pertinent provisions of which read as follows:

"Section 1. That on and after the first day of July, 1937, the annual salaries of the County Superintendents of Public Instruction of the various counties of the State of Florida shall be fixed and based upon the *total annual receipts* of each of said counties *from all sources for school purposes*, including special tax school district taxes and moneys apportioned to the said counties from the State Teachers Salary Fund: Provided, however, that moneys borrowed by the Boards of Public Instruction for current operating expenses shall not be included in the total receipts as hereinbefore set out. The salaries shall be calculated upon the following basis:

"Upon the first \$20,000, 10 per cent thereof shall be paid;" et cetera. * * *

"The annual salaries for County Superintendents of Public Instruction shall be based for each year on the total receipts as above set forth for the last preceding budget year and shall be paid in twelve equal monthly installments on the first day of each month provided however that the maximum amount which any Superintendent may be paid shall not exceed the sum of Six Hundred Dollars in excess of amount which he is being paid at time of passage of this Bill for his annual salary."

You first request my opinion with regard to whether the following items

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should be included in computing the total receipts of a county for school purposes:

1. State free textbooks.
2. Proceeds from the sale of bonds and time warrants.
3. Proceeds of insurance policies.
4. Proceeds from the sale of property.
5. Other non-revenue receipts.
6. Grants from the Federal Government through the WPA for use in connection with construction programs.

It is my opinion that none of the above should be included in the total receipts comprising the basis for computing the compensation of the county superintendent. The words in Chapter 17862, "total annual receipts of each of said counties from all sources for school purposes," must be construed in the light of the words of limitation which follow. Such words of limitation evidence a legislative intent to base the compensation of county superintendents on a stated percentage of revenue as distinguished from non-revenue receipts. While the item of State free textbooks, above set forth, may, at first blush, appear to constitute a revenue receipt, it is clear from an inspection of Section 734 of the School Code that the county does not receive the money as such, but receives only a credit in the State Textbook Fund, to be applied on the purchase of textbooks for the county.

You further request my opinion as to whether the provisions of Chapter 17862, limiting the annual salaries of county superintendents to an amount not exceeding \$600 in excess of the amount paid them at the time of the passage of said Act, apply to an increase from year to year or merely to a fixed increase of \$600. It is my opinion that this must be construed as limiting the salary of the county superintendents from now on and until the Legislature sees fit to change the law to amounts not exceeding the compensation paid to such county superintendents at the time of the passage of Chapter 17862, plus \$600.

March 28, 1940—O-771.

**COUNTY BOARD NOT AUTHORIZED TO EXPEND SCHOOL
FUNDS ON LUNCH ROOM PROJECT IN SCHOOL
OPERATED BY CUBAN GOVERNMENT**

Dear Sir:

You request my opinion as to whether the County School Board of Monroe County, as co-sponsor of a WPA lunch-room project, has the legal authority to pay from school funds the gas and light bill in connection with the operation of a lunch room at the San Carlos School, which is operated by the Cuban Government.

Under Article XII, Section 9, of the Florida Constitution, school funds

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"shall be disbursed by the County Board of Public Instruction solely for the support and maintenance of public free schools." See Board of Public Instruction of Okaloosa County v. Kennedy, 147 So. 250.

The enactment of Chapter 4333, Laws of Florida, Acts of 1895, authorizing and directing the County Board of Public Instruction of Monroe County to employ a teacher to instruct the Cuban pupils of the San Carlos School in the elements of the English language, did not make the San Carlos School a "public free school," as contemplated by Article XII, Section 9, of the Florida Constitution.

It is, therefore, my opinion that the County Board of Public Instruction of Monroe County will not have the authority to expend school funds for a lunch-room project in that school.

October 5, 1939—O-593.

**COUNTY COMMISSIONERS AUTHORIZED UNDER CHAPTER 19194
TO PAVE ROADS ON SCHOOL GROUNDS AND IMPROVE
AND BEAUTIFY GROUNDS**

Dear Sir:

You request my opinion as to whether, under Chapter 19194, Laws of Florida, Acts of 1939, the board of county commissioners of a county can pave roads wholly on school grounds, and improve and beautify school grounds.

I have considered the provisions of Chapter 19194. These provisions authorize boards of county commissioners to pave and maintain roads, byways or sidewalks adjacent to or running through property belonging to a school district or other free school, where the material and equipment are available for such work. The boards of county commissioners are further authorized and empowered to plant and maintain trees, flowers, shrubbery and other beautifying plants upon such grounds where the plants, materials, et cetera, are available. The boards of county commissioners and the boards of public instruction are authorized to enter into agreements for accomplishing the purposes hereinabove set forth.

The intent of the Legislature in enacting this statute was to authorize cooperative action by boards of county commissioners and boards of public instruction to accomplish the objectives outlined. This cooperative action contemplates, in general, the use of materials, et cetera, furnished by the boards of public instruction, and labor and equipment furnished by the boards of county commissioners.

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May 11, 1939—O-264.

EMPLOYMENT OF SUPERVISING PRINCIPAL FOR TWO-YEAR PERIOD, BASED ON TRUSTEE RECOMMENDATION FOR ONLY ONE YEAR*Dear Sir:*

This is in reply to your letter of May 11, in which you request my opinion as to whether a county board of public instruction is authorized to contract with a supervising principal for a two-year period, based on trustee recommendation for one year only.

The following is from the opinion of the Supreme Court of Florida, in the case of *Kelly v. Board of Public Instruction for Baker County*, reported in 141 Southern Reporter, page 311, text page 312:

"(1, 2) Section 454, R. G. S., Section 561, C. G. L., in paragraph 6 thereof specifically authorizes county boards of public instruction to employ teachers for every school in the county and to contract with and pay the same for their services. This provision of the statute is ample authority for the county board of public instruction to enter into contracts with teachers for employment during the ensuing school year or term, if the contract be made prior to the opening of the school or to enter into such a contract during any school term for services to be performed during the then current term."

From the language of the Supreme Court above set forth, it would seem that school teachers could not be employed for a two-year period. See also opinion of Hon. Cary D. Landis, as Attorney General, reported at page 174 of the Biennial Report of the Attorney General for the years 1937-'38. The statutes applicable to the employment of teachers also govern the employment of principals. See *Board of Trustees of Special Tax School District No. 6 of Orange County v. Board of Public Instruction of Orange County*, 156 So. 318.

It is therefore my opinion that a county board of public instruction does not have the legal authority to contract with a supervising principal for a two-year period. This is particularly true in view of the fact that in this instance, the trustee recommendation is for one year only.

September 20, 1940—O-931.

ISSUANCE OF INTEREST-BEARING NOTES UNDER SECTION 1086 OF SCHOOL CODE*Dear Sir:*

This is in reply to your letter of September 17, in which you request my opinion as to whether county school boards are authorized to issue interest-bearing notes to fund obligations outstanding against the county school funds on July 1, 1939.

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Specific authority to issue such interest-bearing notes to fund obligations outstanding against the county current or district current school funds at the time of the adoption of the School Code, is contained in Section 1086 of the School Code. Section 1086 prescribes in detail the procedure for issuing such interest-bearing notes, referred to in Section 1086 as "interest-bearing coupon warrants."

Section 1086 appears to be similar in principle to Section 1 of Chapter 8548, Laws of Florida, Acts of 1921 (Section 569, Compiled General Laws). The validity of funding warrants issued under said Chapter 8548 has been upheld in the Supreme Court of Florida in the case of State Board of Education v. Board of Public Instruction for Lake County, 190 So. 253.

November 15, 1939—O-655.

**MEMBERS OF INSTRUCTIONAL STAFF IN SCHOOLS WHO ARE
COMMISSIONED RESERVE OFFICERS ENTITLED TO
PAY DURING ABSENCE TO ATTEND COM-
PULSORY TRAINING COURSE**

Dear Sir:

This is in reply to your letter of November 6.

You request my opinion as to whether a member of the instructional staff in any school who is a commissioned reserve officer of the United States Military or Naval Service is entitled to all or part of his pay as a member of the instructional staff during his absence from instructional duties to attend a compulsory two-weeks training course.

I call your attention to Section 1 of Chapter 17975, Laws of Florida, Acts of 1937, which reads in part as follows:

"Section 1. All officers or employees of the State of Florida, or of the several counties or municipalities of this State, who are commissioned reserve officers in the United States military or naval service, shall be entitled to leave of absence from their respective duties, without loss of pay, time or efficiency rating, on all days during which they shall be engaged in field or coast defense exercise or other training ordered under the provisions of the United States military or naval training regulations for reserve officers when assigned to active duty pursuant to their commissions, provided that leaves of absence granted as a matter of legal right under the provisions of this section shall not exceed seventeen (17) days in any one annual period."

It is my opinion that Chapter 17975, Laws of Florida, Acts of 1937, above set forth, would apply to the members of the instructional staff of a Florida public school and that such employees would be entitled to leaves of absence from their respective duties, without loss of pay, while attending a training course as commissioned reserve officers of the United States Military or Naval Service for not exceeding seventeen days in any one annual period.

SCHOOLS — Miscellaneous

September 20, 1940—O-929.

**MINIMUM AGE FOR ADMISSION TO FIRST GRADE—SECTION
601 OF SCHOOL CODE***Dear Sir:*

In my opinion to you under date of September 4, 1940, I stated, in effect, that under Section 601 of the School Code, a child who reaches the age of five years and eleven months within the first two weeks of a semester, in the case of a school having semi-annual promotions, and a child who reaches the age of five years and nine months during the first month of the school year, in the case of a school having annual promotions, are eligible for admission during said periods of two weeks and one month respectively.

You further request my opinion with regard to whether a child must have reached the age of five years and nine months of age, in the case of a school having annual promotions, within the first *school* month or the first *calendar* month after school opens. It is my opinion that the "first month" referred to in Section 601 is the first calendar month after school opens. If, for instance, school opens on September 2, the child would be eligible for admission if he attains the age of five years and nine months on or before October 2. This conclusion is supported by Section 115 of the School Code, which provides that words used in the School Code, unless otherwise defined, shall have their ordinary and generally accepted meaning. While the words "school month" are defined in Section 118 of the School Code, it is to be noted that Section 601 refers to "the first month" and not to the first "school month."

You further request my opinion as to whether a child who has been properly admitted to the first grade of one school is eligible to be admitted by transfer to another school, which began several weeks earlier, and to which the child would not have been eligible for admission in the first instance by reason of insufficient age. It is my opinion that the child should be admitted to the other school by transfer. His eligibility to attend school should be determined on the basis of the opening day of the school which he originally attends.

June 28, 1939—O-440.

**NEPOTISM STATUTE—APPLICABILITY TO EMPLOYMENT OF
BUS DRIVERS BY COUNTY SCHOOL BOARDS***Dear Sir:*

You request my opinion as to whether the general nepotism statute, Chapter 16086, Laws of Florida, Acts of 1933, would apply to employment of bus drivers by county school boards, after the School Code goes into effect on July 1, 1939.

Section 1 of Chapter 16088 reads as follows:

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"Section 1. That any State Officer, member of State Board, County Officer, member of County Board or Commission, City Official, or his appointee, who shall knowingly employ, either directly or indirectly, any person related within the fourth degree, either by consanguinity or by affinity, to such State Officer, member of State Board, County Officer, member of County Board or Commission, City Official, or his appointee, shall be deemed guilty of misfeasance and malfeasance in office and subject to removal therefor. Provided, however, that the provisions of this Act shall not apply to officers above who employ only one person related to him as above set out."

The Supreme Court of Florida, in the case of *State ex rel. Robinson v. Keefe*, 149 So. 638, held that Chapter 16088 did not apply to the employment of school teachers. The following are the pertinent provisions of the opinion of the Supreme Court:

"(2) 'Nepotism' has been defined as the bestowal of patronage by public officers in appointing others to offices or positions by reason of their blood or marital relationship to the appointing authority, *rather than because of the merit or ability of the appointee*. The Florida Act should be construed in the light of its obvious purpose to discourage 'nepotism' as above defined. * * *

"(5) So the reason for not applying a statute of this kind to a class of appointees such as school teachers, whose merit must be established before they are permitted to be employed at all, is found in the fact that the Legislature has by other complete statutes, not in terms modified or repealed by this one, provided a special system for the appointment and tenure of employment for school teachers. The requirements of this separate code of laws afford adequate protection against appointments other than upon proved merit, which is all that an 'Anti-nepotism' law can constitutionally be supposed to cover and still remain within the police power, under the guise of which it is enacted." (Italics ours.)

In view of the fact that the School Code prescribes a special system for the appointment of school bus drivers, which affords adequate protection against appointments other than upon proved merit, it is my opinion that, under the holding of the Florida Supreme Court in the case above referred to, the general Nepotism Act would not apply.

May 2, 1939—O-170.

PAYMENT OF MONTHLY INSTALLMENT OF \$1,264,766.32 TO
COUNTY SCHOOL FUND

Dear Sir:

In your letter of the 1st instant you state that the County School Fund is entitled to a monthly installment of \$1,264,766.32, that you have available for such installment the sum of \$898,619.49 derived from sources provided by law other than the General Revenue Fund, leaving a deficit of \$366,146.83. You

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also state that the General Revenue Fund now has sufficient money to meet this appropriation, which I understand to mean that this deficit of \$366,146.83 can be supplied from the General Revenue Fund to make complete the monthly installment of \$1,264,766.32 due to the County School Fund appropriation for May 1 payment.

Section 1 of Chapter 17247 makes it the duty of the boards of public instruction of the several counties to provide a minimum of eight months free schools, and Section 2 of said Act appropriates annually from the General Revenue Fund a sum sufficient to supplement the requirement of Section 1 of said Act to an amount equivalent to \$800.00 for each instruction unit existing in the State during the immediately preceding scholastic year. This is made a continuing appropriation to the County School Fund.

On the basis of the statement in your letter that the General Revenue Fund now has sufficient money to supplement the County School Fund to the amount of \$1,264,766.32 for the installment due on said appropriation for May 1, 1939, by paying from the General Revenue Fund the sum of \$366,146.83, it is my opinion that Chapter 17247, Laws of Florida, Acts of 1935, as construed and to the extent upheld by the Supreme Court of Florida in *State ex rel. Kurz v. Lee*, 121 Fla. 360, 163 So. 859, authorizes you to pay to the County School Fund from the General Revenue Fund the sum of \$366,146.83, as a supplement to the funds derived from other sources to meet the May 1 requirement of said County School Fund.

May 16, 1939—O-268.

SCHOLARSHIPS—UNDER SECTION 768, C. G. L., 1927

Dear Sir:

This will acknowledge receipt of your letter of May 15.

You state that Section 768 of the Compiled General Laws of Florida, 1927, provides that each County in the State of Florida will have the right to send one student annually or so often as a vacancy may occur to each of the Institutions under the management of the Board of Control without any charge for instruction, and that shortly after the Board of Control was organized a matriculation fee of \$10.00 per student was fixed. You also state that a scholarship student was given credit for said fee and when the Law School was established at the University of Florida, the Board fixed the annual tuition to be paid by each law student at \$40.00 per year and that this fee is still charged. You state that a law student who holds a county scholarship has asked for the additional credit of \$40.00 that you have been charging for tuition, and you ask my opinion as to whether or not the section of law above referred to will require the board to give a student in the Law College such credit.

In reply I wish to advise that Section 768 of the Compiled General Laws of Florida above referred to was passed in 1905, being Chapter 5384. This

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law also created the Board of Control and it is my opinion that this statute would control over any regulation that has been made by the Board of Control fixing an annual tuition to be paid by a law student when such law student comes within the meaning of Section 768, C. G. L., and that such law student is entitled to be credited with the matriculation fee as you have done in the past and the tuition fee in the sum of \$40.00. Otherwise, such section of the statutes would be of no value to a scholarship student who wished to enter the law school.

I can make no distinction between the Law School and any other school at the University because the Act refers to the University of Florida and the Florida State College for Women and makes no limitation as to which particular school or department of the University that the scholarship student may attend.

CHAPTER IX

STATE OFFICERS, BOARDS AND COMMISSIONS

SECTION 1

Armory Board

October 27, 1939—O-618.

STATE PROPERTY AT CAMP FOSTER—MONEY DERIVED FROM SALE SHOULD BE DEPOSITED IN STATE TREASURY

Dear Sir:

I have your letter of recent date requesting my opinion as to the proper disposition of and procedure for the disbursement of the sum of \$400,000.00 received by you for the purchase of your equity in Camp Foster, such sale having been made by you pursuant to the terms of Chapter 19447, Acts of 1939. You state:

"In the past the Armory Board has been in possession of small sums which were deposited in local banks and which were disbursed by the recorder of the Board after the adoption of proper resolutions."

You refer to Sections 2054 and 2055 of the Compiled General Laws of 1927 as authority for handling this money in the matter outlined above.

I think it would be more proper to re-state your question in this form:

Should said sum of \$400,000.00 be deposited by you in the State Treasury and paid out by State warrant in the usual manner after your requisition upon the Comptroller, or would it be proper for you to deposit said money in a private depository and issue checks against the same?

In reply I wish to advise that I have examined Chapter 19447, Acts of 1939, and I am unable to find any language therein that would shed any light upon this question, although the Act does say:

"... any such county or special taxing district shall pay to said Armory Board of the State of Florida. * * *"

However, I am of the opinion that the Legislature by this language only intended to provide a convenient method for the speedy handling of the transaction, and I do not take it to be an indication that the money received by the Armory Board was not to be deposited in the State Treasury. As a matter of fact, the first part of the Act provides:

"The Armory Board of the State of Florida is hereby authorized, directed and empowered for and on behalf of and as the agent of the State of Florida, to assign, transfer and convey * * *"

STATE OFFICERS — Armory Board

From this language I think it is apparent that you acted merely as the agent of the State of Florida in making this sale, and the money derived therefor represented State property and is therefore State funds and should be deposited in the Treasury of the State of Florida.

However, I am further of the opinion that it was the intention of the Legislature that this money be held in the State Treasury in a special fund earmarked solely for the purpose of replacing the camp site for the National Guard of the State of Florida that was sold under the terms of said Act, and it was the further intention of the Legislature that the Comptroller should honor your requisition upon said funds for the purpose of relocating, purchasing, equipping and replacing a camp site for the National Guard of the State of Florida, and that he should issue his warrant therefor in the usual manner.

The only objection that could possibly be made to this plan would be that there was no appropriation that would allow the Comptroller to issue a warrant for the above purpose as this would be in violation of Article IX, Section 4, of our Constitution which provides:

"No money shall be drawn from the Treasury except in pursuance of appropriations made by law."

I do not think this would be a valid objection for two reasons. First, as I have said above, I am of the opinion that it was the intention of the Legislature that any moneys derived from the sale of Camp Foster should be held and used exclusively for the replacing, re-establishing and re-equipping another camp site for the National Guard of the State of Florida, and that the money when deposited in the State Treasury should be held and used exclusively for such purpose.

Secondly, I am of the opinion that Section 2054 and Section 2055, Compiled General Laws, 1927, contain full statutory authority for the procedure outlined above.

Subsection (i) of Section 2054 provides:

"(i) Whenever it may become necessary in the public interest to acquire private property in order to provide necessary land for camp grounds, rifle ranges or armories for the organized militia of the State, and the same cannot be acquired by agreement satisfactory to the armory board and the parties interested in, or the owners of such private property, the armory board is hereby authorized and empowered to exercise the right of eminent domain, and to proceed to condemn such property in the manner provided by law. Any suits or actions brought by the armory board to condemn property, as provided for under this section, shall be brought in the name of the armory board, and it shall be the duty of the Attorney General of the State of Florida to conduct the proceedings for and to act as the counsel of the said board in such matters."

Subsection (c) of Section 2055 provides:

"(c) The Armory board shall also be charged with the supervision and

STATE OFFICERS — Armory Board

management of any permanent camp site, target range or ranges, which are now or may hereafter become the property of the State; or which, being the property of the United States, may be turned over to the State to be used for military purposes; such board shall have authority to provide for the maintenance and proper equipment of the same from any funds which may be available for the purpose."

I think it apparent from the above quoted sections of the statutes that you have authority to purchase another camp site from any funds which may be available for the purpose and subsection (c) of Section 2055, Compiled General Laws, 1927, is an appropriation therefor.

I do not think anyone could hardly say that the Legislature would have authorized the sale of Camp Foster and leave the State of Florida without a camp site for its National Guard when there were, at the time of the passage of said Act by the Legislature, upon the statute books, the statutes that I have above referred to which specifically authorized you to provide and maintain a camp site for the National Guard of the State of Florida and authorized you to use any funds available for this purpose.

I think if any authority was needed for the last proposition that same would be found in the case of Mayo, Commissioner of Agriculture, et al., v. Matthews, 150 So. 900. The contention was made in that case that the Governor and the State Administrative Officers were without authority of law to purchase certain land on which to erect a chemistry laboratory for the State. The Act in question there provided:

"The Governor shall provide a suitable laboratory, furniture and all the necessary chemicals for the State Chemist out of any funds in the State treasury not otherwise appropriated. * * *"

The Court said:

"In view of the statutory duty of the Governor to provide a suitable laboratory for the State chemist and of the shown need for such laboratory for the inspection department, the legislative intent in using the words, 'equipment and other property,' in authorizing expenditures for the inspection department, reasonably includes needed and appropriate land for 'a suitable laboratory.' * * * An obvious intent of the statutory enactments, when considered together and in view of the purpose designed by the enactments, is to authorize the Governor and the constitutional board of commissioners of state institutions to provide and to pay for . . . 'equipment and other property,' including suitable and needed land on which to construct a suitable laboratory for the state chemist. * * *"

I, therefore, believe that the only wise course to follow and certainly the one that would be above criticism, would be the one I have outlined above and this opinion may be taken and considered by your Board and the Comptroller of the State of Florida as your authority for the deposit and disbursement of said money in the Treasury of the State of Florida.

STATE OFFICERS—Armory Board

August 7, 1930—O-510.

STATE PROPERTY AT CAMP FOSTER—CONVEYANCE TO
UNITED STATES NAVAL AIR BASE, DUVAL COUNTY*Dear Sir:*

At your request I have gone into and considered the subject matter contained in the letter of Adjutant General Vivian Collins addressed to you, under date of August 1, 1939, with respect to the property owned by the State of Florida to be conveyed to the Duval County Air Base Authority for use by the United States in connection with the Naval Air Base to be located in Duval County.

Section 24 of Chapter 19,784, Laws of Florida, Special Acts of 1939, authorizes, empowers and directs the Armory Board of the State of Florida, for and on behalf of and as agent of the State of Florida, to assign, transfer and convey to said Authority Board all or any portion of any property, real or personal, together with all betterments, improvements and appurtenances thereunto, including riparian rights, within the territorial extent of said Authority now owned, whether in fee or otherwise, by or heretofore used or reserved by the State of Florida for military uses and purposes, such assignment, transfer and conveyance to be upon such terms as to consideration as the said Armory Board of the State of Florida and the Authority Board shall mutually deem advisable. In the event that the Armory Board and the Authority Board shall be unable to mutually agree upon the amount of the consideration, which said Authority Board shall pay to the Armory Board of the State of Florida for said assignment, transfer and conveyance, then and in that event, the State of Florida by said Act consents to be sued in condemnation by said Authority in order that the value of the property so sought by the Authority Board, for the purpose of carrying out the provisions of said Act, may be judicially fixed and determined.

The said Act of the Legislature has been construed and upheld by the Supreme Court in an opinion filed May 29, 1939, in a case of original jurisdiction in mandamus brought by the State of Florida ex rel. George Couper Gibbs, as Attorney General of the State of Florida, Relator, v. Robert D. Gordon, et al., Respondents, wherein the constitutionality of said Act was attacked and sustained and wherein the contention was made and overruled by the Court that the State cannot consent by Special Act of the Legislature to be sued. —

I have caused the subject matter of General Collins' letter to be discussed between one of my Assistants and the Attorney for the Duval County Air Base Authority, and I am assured that no condemnation proceedings will be instituted for the acquisition of the State's said property unless and until the said Armory Board of the State of Florida and the Duval County Air Base Authority shall have failed to mutually agree upon the amount of consideration which the said Duval County Air Base Authority shall pay to the

STATE OFFICERS — Armory Board

said Armory Board of the State of Florida for the assignment, transfer and conveyance of the State's said property.

As I construe the Act, the State consents to be sued only in the event the two Boards fail to agree on the compensation to be paid and if suit should be instituted without the Authority Board first endeavoring to reach a mutual agreement with the Armory Board, the Court would not have jurisdiction to entertain such action.

I am also advised that the Duval County Air Base Authority has engaged the services of appraisers and that as soon as an appraisal has been made of the State's said property, as a basis for negotiations, the Authority Board will be ready to undertake to mutually agree with the Armory Board as to the price to be paid for said property.

SECTION 2

State Officers—Auditors

January 30, 1940—O-714.

AUDITORS—MANNER OF DETERMINING EFFECTIVE DATE OF
RESIGNATION OF ASSISTANT*Dear Sir:*

This will acknowledge receipt of your letter of January 29th requesting my opinion as to whether or not a warrant can be issued to the widow of the late * * * under the following facts:

"The late * * * was a duly commissioned Assistant State Auditor. He resigned from this department, completing his work on October 19, 1938. It appears, however, that the acceptance of his resignation was not filed in the office of the Secretary of State until December 3, 1938. His widow is now requesting this department to pay his salary for the time between October 19 and December 3."

I checked the records in the office of the Secretary of State and I find that the said late * * * resigned on September 30, 1938, and his resignation was accepted on the same day. However, as you point out, it was not filed in the office of the Secretary of State until December 3rd, 1938.

Section 461, Compiled General Laws of Florida, provides:

"Every office shall be deemed vacant in the following cases * * * by his resignation. * * *"

The Supreme Court of Florida in the case of *State ex rel. Jackson v. Crawford*, 79 So. 875, construed this statute. The Court said:

"Section 298 of the General Statutes of 1906 (this is now Sec. 461, C. G. L. 1927) enumerates the various methods by which offices may be vacated, the second of which is 'by his resignation.' The law is silent as to whether or not such resignation must be accepted by the Governor. If his acceptance is necessary, it may be orally or in writing. * * *"

Apparently the Supreme Court was in doubt as to whether or not a resignation required the acceptance by the Governor, but they did indicate that if an acceptance was necessary it could be oral or in writing and the Court said nothing whatsoever about the resignation not being effective until it had been filed in the office of the Secretary of State.

I, therefore, am of the opinion that since the late Mr. * * * resigned as Assistant State Auditor on September 30th, 1938, and that his resignation was accepted on said date, and that he completed his work on October 19th, 1938, it would not be proper to pay his salary from October 19th, 1938, to December 3rd, 1938.

SECTION 3

State Officers — Barber Examiners

July 11, 1939—O-466.

AMOUNT IN FUND OVER AMOUNT IMPOUNDED MAY BE
RELEASED*Dear Sir:*

I have your letter of the 7th, which you handed to me yesterday, in which you state that there is in the State Board of Barbers' Examiners Fund the sum of \$2,169.35; that on March 10, the Supreme Court issued a peremptory writ of mandamus directing the Comptroller to pay Otto F. Bocher \$1,885.00 from this fund; that you were ready and willing to comply with this writ but that the Governor had refused to place his name on the warrant for said amount; and that on May 24, 1939, the attorney for Bocher notified you to keep this sum impounded so that the commands could be complied with if the Governor should later change his mind. You further state that you have in the file in your office a payroll against this fund in the amount of \$800.00 for the Month of May, together with other items of expense which have not been paid. In response to your request for my opinion as to whether or not this \$2,169.35 would all be impounded to meet the \$1,885.00 which the Supreme Court states is due Bocher, or whether you would be justified in releasing all of the sum in excess of the \$1,885.00, I would state that in my opinion, since the commands of the writ only direct you to pay the sum of \$1,885.00 to Bocher, that you must keep this amount impounded, but that you may use all the funds in excess of this amount in paying the bills incurred by the Board during May.

SECTION 4

State Officers—Barbers' Sanitary Commission

July 5, 1939—O-442.

AUTHORITY TO APPROVE PAYMENT OF SALARIES FOR
EMPLOYEES FOR MONTH OF JUNE*Dear Sir:*

I am in receipt of your letter of June 30, in which you state that the present Barber Commission Law went into effect on the 31st day of May, 1939, repealing the old Barbers' Examining Board Law on the same day; that the members of the Barbers' Sanitary Commission qualified under their appointments on June 19, 21 and 24, 1939, stating further that the Secretary of the State Board of Barber Examiners and other employees under the old law continued to work during the month of June, 1939, and inquiring as to whether or not the Barbers' Sanitary Commission would have authority to approve requisitions and the Comptroller would have the authority to pay same for the salaries of these individuals employed for the full month of June, 1939.

Section 22 of Chapter 19183, Laws of Florida, 1939, provides as follows:

"All moneys received by the Commission under this Act shall be paid to the Secretary of the Commission, who shall give a receipt for the same and shall at the end of each month report to the State Comptroller the total amount of money received by him on behalf of the Commission from all sources, and shall at the same time deposit with the State Treasurer the entire amount of such receipts, and the State Treasurer shall place the money so received in a special fund known as the 'Barbers' Sanitary Commission Fund,' which fund is hereby created. Such fund shall be expended in accordance with law for all necessary and proper expenses in carrying out the provisions of this Act upon proper claim approved by said Commission, or a finance committee thereof, and is hereby annually appropriated for such purposes."

Section 25 appropriates Fifteen Hundred (\$1500) Dollars to be used by the Commission to pay salaries, expenses and costs of enforcement of this Act.

It is therefore my opinion that if the Commission employed the Secretary and the other employees for the month of June and they actually worked during this month, that the Board has a right to ratify this employment for the full time during that month and that they have the power to approve the salaries of those employees for that month, and that you have authority to pay the warrants issued for the payment of the salaries.

STATE OFFICERS — Barbers' Sanitary Commisison

July 11, 1939—O-467.

**MEMBER NOT ENTITLED TO SALARIES UNTIL AND WHEN
QUALIFIED***Dear Sir:*

I am in receipt of your letter of the 7th, in which you request my opinion as to whether or not salaries for the members of the Barbers' Sanitary Commission can be paid for the full month of June, 1939, in view of the fact that these members did not qualify until June 19, 21 and 24, 1939, respectively.

I have examined the records in the Secretary of State's office and they show that the members of this Commission were appointed on June 15, 1939, but did not take the oath of office and qualify otherwise until the dates above mentioned.

Under Section 2 of Article XVI of the Constitution, every officer of this State has to take an oath before he can discharge his official duties thereunder, and by virtue of the provisions of Section 7987, Compiled General Laws, 1927, it is a crime for him to perform any of the duties of the office before he is qualified. Since the members of the Barbers' Sanitary Commission are State officers and since they could not legally perform their official duties until they had taken the oath and qualified, which in this case was June 19, 21 and 24, it is my opinion that they are not entitled to be paid any compensation for any part of the month during which they had not qualified to legally fulfill the duties of their office.

This opinion does not conflict with my previous opinion of June 5, since that opinion related solely to employees of the Board and not to State officers.

July 20, 1939—O-482.

**BARBERS' SANITARY COMMISSION NOT AUTHORIZED TO PAY
BILLS INCURRED BY OLD BOARD***Dear Sir:*

I am in receipt of your letter of the 19th, in which you state that there is approximately \$1300 due for salaries for May and other expenses incurred by the State Board of Barber Examiners under Chapter 14650, Acts of 1931, and state that there is no money collected under the provisions of this chapter to pay these bills. You inquire as to whether or not the Barbers' Sanitary Commission could pay these bills out of moneys collected under or appropriated by Chapter 19185, Acts of 1939, creating the Barbers Sanitary Commission. Section 22 of this Act provides as follows:

"Section 22. RECEIPTS AND THEIR DISPOSITION.—All moneys received by the Commission under this Act shall be paid to the Secretary of the Commission, who shall give a receipt for the same and shall at the end of each

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month report to the State Comptroller the total amount of money received by him on behalf of the Commission from all sources, and shall at the same time deposit with the State Treasurer the entire amount of such receipts, and the State Treasury shall place the money so received in a special fund known as the 'Barbers' Sanitary Commission Fund,' which fund is hereby created. Such fund shall be expended in accordance with law for all necessary and proper expenses in carrying out the provisions of this Act upon proper claim approved by said Commission, or a finance committee thereof, and is hereby annually appropriated for such purposes."

I do not find any provision in this Act allowing the Barbers' Sanitary Commission to pay the bills incurred by the State Board of Barber Examiners under the 1931 Act. It is therefore my opinion that these bills cannot be paid out of moneys collected under or appropriated by Chapter 19183.

July 26, 1939—O-497.

**REGISTERED BARBER MAY PRACTICE FINGERWAVING OR
SETTING HAIR**

Gentlemen:

I am in receipt of your letter of the 25th, in which you inquire as follows:

"This is to advise that I am in receipt of a letter from Mr. C. S. Hammons, President of this Commission, requesting that I ascertain from you an opinion relative to whether or not under the Barbers' Sanitary Commission Act of 1939, a registered barber has the right to practice fingerwaving or waving and setting the hair of his patron. This reference is made in the law under Section 2, paragraph 2; and Section 7, paragraph 2, copy of which I am enclosing herewith."

Section 2 of Chapter 19183 Laws of Florida, Acts of 1939, provides in part as follows:

"Anyone or any combination of the following practices (when not done for the treatment of disease of physical mental ailments and when done for payment either directly or indirectly or without payment for the public) constitutes the teaching and practice of barbering.

"Shaving, or trimming the beard or cutting, waving or bobbing the hair."

It is therefore my opinion that under this section a qualified barber registered under the 1939 Act does have the right to practice fingerwaving or waving or setting the hair of his patrons, as this is part of the definition of barbering in the Act.

STATE OFFICERS — Barbers' Sanitary Commisison

October 30, 1939—O-642.

**CONSTRUCTION OF LAW RE: PAYMENT OF EXPENSES AND
MAKING REPORT TO GOVERNOR***Dear Sir:*

I am in receipt of your letter of the twenty-seventh in which you state that under Section 14 of Chapter 19183, Acts of 1939, "The Barbers' Sanitary Commission Bill," each registered barber is required annually, on or before July first of each year, to renew his or her certificate of registration and pay the required fee, and because of this provision of the law practically all the revenue of this department is paid on July first of each year. You further called my attention to the last portion of said section which provided that whatever amount any member of the commission, or its Secretary, shall receive in one *calendar* year as compensation, salary and expense money, shall be deemed and held to be accepted in full and final payment of all compensation, salary and expenses due such member, etc.

You asked my opinion as to whether or not the payment to the Commission, or its Secretary, shall be computed on a calendar year from January first to December thirty-first, or from some other annual period, and also, whether or not the annual report required to be made to the Governor and the surplus fund transferred to the General Revenue Fund under Section 21 of the Act shall be based on a calendar year beginning January first and ending December thirty-first or some other annual period of the year.

In answer to your first inquiry, I would state that a reading of the whole bill discloses that it was the intention of the Legislature for the expenses of this Board to be paid out of the revenue it collected with the exception of small appropriations provided in Section 25 of the Act. It was also the intention of the Legislature that this Board should perform its duties throughout the year. Yet, if the strict wording of Section 21 be followed, and the surplus fund turned into the General Revenue Fund at the end of the calendar year; to-wit, December thirty-first, then the Board would have no revenue to operate with for the succeeding six months until the first of July. It, therefore, appears to me that although the Legislature used the word *calendar* year that it intended that the affairs of this Board should be conducted on the fiscal year as all other Boards are conducted; that is, from and including July first until and including June thirtieth of each year. It is, therefore, my opinion that the payment to the Commission, or its Secretary, shall be computed not from and including January first to and including December thirty-first, but from and including July first to and including June thirtieth, and that the annual report required to be made to the Governor and the surplus fund required to be transferred to the General Revenue Fund shall be based on the fiscal year beginning July first and ending June thirtieth of each year.

STATE OFFICERS — Barbers' Sanitary Commission

August 1, 1940—O-885.

QUALIFICATIONS PRESCRIBED FOR TAKING EXAMINATION
FOR REGISTRATION AS A BARBER*Gentlemen:*

This is in reply to your letter of July 31.

In your letter, you refer to a problem connected with an application to take an examination for a certificate of registration as a barber under Chapter 19183, Laws of Florida, Acts of 1939. You state that the applicant practiced barbering in the State of Florida for approximately twenty-five years prior to 1930, when he ceased barbering. He has not practiced since that time and has never qualified under provisions of Chapter 14650, Laws of Florida, Acts of 1931, and has never received a certificate of registration as a barber or an apprentice barber and is not graduated from a school of barbering approved by the Commission. You request my opinion as to whether the applicant is entitled to take the examination under Chapter 19183, without first graduating from a school of barbering approved by the Commission.

Sections 5 and 6 of Chapter 19183 read as follows:

BARBER QUALIFICATIONS

"Section 5. A person is qualified to receive a certificate of registration to practice barbering:

- (a) Who is qualified under the provisions of Section 6 of this Act.
 - (b) Who is at least eighteen years of age, of good moral character and temperate habits; and
 - (c) Who has practiced as a registered apprentice for a period of eighteen months under the immediate personal supervision of a registered barber; and
 - (d) Who has passed a satisfactory examination conducted by the Commission to determine his or her fitness to practice barbering;
- (c) An applicant for a certificate of registration to practice as a registered barber who fails to pass a satisfactory examination conducted by the Commission, must continue to practice as an apprentice for an additional six months before he is again entitled to take the examination for a registered barber.

APPRENTICE QUALIFICATIONS

"Section 6. Any person is qualified to receive a certificate of registration as a registered apprentice;

- (a) Who is at least sixteen and one-half years of age, and
- (b) Who is of good moral character and temperate habits, and
- (c) Who has graduated from a school of barbering approved by the Commission, and
- (d) Who has passed a satisfactory examination conducted by the Commission to determine his or her fitness to practice as a registered apprentice.

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(e) Who can furnish to the Commission a certificate from a practicing medical doctor of this State dated not more than ten days prior to the date of the application attesting that he or she is free from an contagious or infectious disease.

(f) An applicant for a certificate of registration to practice as an apprentice in a barber shop who fails to pass a satisfactory examination is required to complete a further course of study and practice of not less than five hundred hours, to be completed within six months, of not more than eight hours in any working day in a school of barbering approved by the Commission."

The intent of the Legislature, expressed in the statutory provisions above set forth, was obviously to require training and experience as a prerequisite to taking an examination for a certificate of registration as a barber. Those provisions of Section 6 requiring persons to be graduates from a school of barbering approved by the Commission in order to take the examination as a registered apprentice barber, as well as the provisions of Section 5 requiring an applicant for registration as a barber to practice as a registered apprentice for a period of eighteen months, were undoubtedly intended by the Legislature to apply to persons who have had no previous active experience as barbers. That is the only construction which could be placed on such provisions, without rendering such requirements subject to grave constitutional objections. Such provisions could not have been reasonably intended to apply to one who has earned his livelihood as a barber for twenty-five years or for any extensive period of time.

It is my opinion that, while the person to whom you refer in your letter would not be entitled to certificate of registration without examination under Section 12 of Chapter 19183, he would be entitled to take the examination for such a certificate under that statute. The applicant, concerning whom you inquire, is not a beginner, and the provisions requiring him to be a graduate of a school of barbering and to serve an apprenticeship of eighteen months could not, therefore, apply to him. His twenty-five years in the active practice of barbering is easily the equivalent of such training and apprenticeship and the intent of the Act, constitutionally construed, would not only authorize, but require, the Barbers Sanitary Commission to permit the applicant to take an examination.

SECTION 5

State Officers—Beverage Department

June 19, 1939—O-390

BEVERAGE ACT—DECREES OF OFFENSES AND PENALTIES
THEREFOR*Dear Sir:*

Supplementing my letter of June 1 in reply to your letter of May 31 in regard to the above subject, I find that the questions have been clarified by Chapter 19301, Section 3, General Acts of 1939, amending Section 15 of Chapter 16774, to provide that a false entry or a wilful violation of the beverage Act as amended, in regard to excise taxes, shall be a felony punishable upon conviction by imprisonment in the State Prison for not exceeding five years or by fine not exceeding \$5,000.00, or by both imprisonment and fine; that the violation of any other provision shall be a misdemeanor punishable upon conviction by imprisonment in the county jail not exceeding six months or by fine not exceeding \$500.00, or by both fine and imprisonment. The same section provides for punishment of second offenses by imprisonment not exceeding one year in the State Penitentiary or a fine not exceeding \$5,000.00, or by both imprisonment and fine.

Section 6 of the new Act provides for punishment of conspiracy to violate the Act by imprisonment not exceeding six months in the county jail and by fine not exceeding \$500.00 in cases of a conspiracy to commit a misdemeanor under the Act and by imprisonment in the State Penitentiary not to exceed one year or by fine not to exceed \$5,000.00 or by both fine and imprisonment, in case of conspiracy to commit a felony under the Act.

Section 15 (d) makes it an offense to refuse to permit certain inspections.

The Act of 1939, therefore, will control the degree of offenses and the penalties in cases of unlawful conduct after its effective date July 12, 1939.

Concerning offenses before that date, I think the construction suggested in Mr. Anvil's memorandum enclosed with your letter is sound in the ordinary case, to-wit: that a sale before that date of beverages subject to tax upon which the tax is not paid is a felony, and that the possession thereof before that date by other than a licensee is a misdemeanor, although the Act of 1935 as amended by Chapter 18015, Acts of 1937, is subject to the further interpretation than the possession of such beverages during the period of operation of the penal section of that Act could be a felony if the acquisition and possession of such beverages was wilfully unlawful, that is, with knowledge that the beverages were subject to a tax and the taxes were not paid, and with intent to evade the law.

Of course, in reference to prosecutions after the effective date of the

STATE OFFICERS — Beverage Department

latest Act, you should consider carefully whether they may be maintained, that is, whether the new Act will be an ex post facto law with regard to offenses committed before its effective date, on which point I have made no examination and render no opinion.

The General Acts are now being printed in leaflet form and I am informed by the Secretary of State will be ready for distribution in about two weeks.

SECTION 6

State Officers—Board of Administration

January 20, 1939—O-21.

CHANGE OF INVESTMENT

Dear Sir:

This is in reply to your letter of January 13, 1939, in which you advise that Putnam County owns twenty-six Broward County bonds. You wish to be advised as to whether or not it will be possible to (1) sell these bonds and use the proceeds to purchase Putnam County securities, or (2) exchange these bonds for other Putnam County securities.

The Attorney General's office has ruled that investments may not be sold at a price of less than par. If these bonds can be sold at par or above, the proceeds may be invested in Putnam County securities. The Attorney General's office also has held that it is beyond the power of the Board of Administration to change the form of investments.

In the case of *State ex rel. Pinellas County v. Sholtz*, 155 So. 736, the Supreme Court of Florida held that the proper procedure would be for the Board to file a bill in equity submitting to the chancellor the advisability of making a change in the form of investment. Subsequent to this decision, the 1937 Legislature passed an Act authorizing the Board of Administration to exchange bonds in interest and sinking fund accounts for refunding bonds. You will note that this statute did not authorize the exchange of the bonds of one county for bonds of another county.

January 25, 1939—O-30.

FILING PROOF OF CLAIM AGAINST BANKRUPT MUNICIPALITY—
GULFPORT, PINELLAS COUNTY*Dear Sir:*

In reply to your letter of January 24, 1939, enclosing form of proof of claim against the Town of Gulfport, on \$20,000 Gulfport bonds held by the Board of Administration, in an investment account for Pinellas County bonds.

You ask to be advised as to whether or not the Board of Administration would have authority to execute and file such proof of claim. I am of the opinion that the Board of Administration has such authority. The form of proof of claim is enclosed.

STATE OFFICERS — Board of Administration

February 16, 1939—O-58.

**PUBLISHING ADVERTISEMENTS FOR BOND OFFERINGS—
SUMTER COUNTY***Dear Sir:*

This is in reply to your letter dated today, enclosing resolution of the Board of County Commissioners of Sumter County, dated January 14, 1939, and resolution of the same Board of County Commissioners, dated February 7, 1939, requesting the Board of Administration to advertise inviting bond offerings.

You ask for my written opinion on three questions concerning the authority of the Board of Administration to publish advertisements inviting bond offerings.

Section 17 of Chapter 14486, Laws of Florida, Acts of 1929 (Board of Administration Act), authorizing the investment of funds in the hands of the State Treasurer, as County Treasurer Ex Officio, impliedly authorizes the Board of Administration to publish advertisements inviting bond offerings. I am of the opinion that this power to publish such advertisements may be exercised independently of any request by the County Commissioners, and that the Board of Administration may modify the language in the form of advertisement suggested by the county, so as to include all bond issues of the county. I am also of the opinion that the Board of Administration is legally authorized to publish the form of advertisement enclosed in your letter.

February 20, 1939—O-52.

**FUNDS LEVIED SOLELY FOR PAYMENT OF REFUNDING BONDS,
NOT LEGALLY APPLICABLE UNREFUNDED BONDS
OR INTEREST COUPONS***Dear Sir:*

Your letter of February 15, 1939, enclosed certified copy of a resolution of the Trustees of Atlantic-Gulf Special Road and Bridge District, requesting the Board of Administration to purchase \$600 par value interest coupons for the sum of \$300. Coupons were detached from the original bonds prior to the refunding of the issue. Your letter states that the only funds in the hands of the State Treasurer, as County Treasurer Ex Officio, are funds specifically appropriated for the refunding bonds.

You ask to be advised as to whether or not the Board of Administration can legally pay the aforementioned coupons out of the available funds.

I am of the opinion that the Board of Administration is not authorized to make this payment. Funds levied and appropriated solely for the payment of refunding bonds, are not legally applicable to the payment of the unrefunded bonds or interest coupons detached therefrom. See *State, ex rel. Lawler v. City of West Palm Beach*, 174 So. 737.

STATE OFFICERS — Board of Administration

February 20, 1939—O-51.

REAPPROPRIATION OF TAXES—BROWARD COUNTY

Dear Sir:

This is in reply to your letter of February 10, 1939. It appears that a special tax was levied for the payment of certain bonds and coupons held by Mr. Mittendorf. The tax was levied pursuant to peremptory writ of mandamus, and the collections exceeded the amount of the relator's claim, leaving an unexpended balance in the hands of the Board of Administration. Mr. Mittendorf has now procured a peremptory writ of mandamus commanding a tax levy to pay certain other bonds and coupons held by him.

You ask to be advised as to whether or not it would be possible to use this balance for the payment of the bonds and coupons involved in the second mandamus proceedings, thus relieving the county from levying an additional tax.

I am of the opinion that the Board of County Commissioners of Broward County may, as an alternative, appropriate the unexpended balance of the tax heretofore collected, to the payment of the securities involved in the second peremptory writ of mandamus and, to that extent, relieve the county from the necessity of the tax levy commanded in the peremptory writ. See case of State, *ex rel. Harris v. City of Fort Pierce*, 149 So. 338.

April 1, 1939—O-132.

BONDS—PROCEDURE TO FOLLOW IN PURCHASING

Dear Sir:

This is in reply to your letter of March 13, reading as follows:

"With respect to budgets adopted by the several counties relative to interest and sinking funds of road and bridge bonds, the following conditions exist:

"1. Some of the counties, by resolutions, have rejected the provisions of the Kanner Bill, Chapter 15891, Acts of 1933, and have appropriated gasoline tax funds in their budgets to interest and sinking fund requirements.

"2. Some of the counties, by resolutions, have accepted the provisions of the Kanner Bill and did not appropriate gasoline taxes in their budgets for bond debt service.

"3. A few of the counties, by resolutions, accepted the provisions of the Kanner Bill and also appropriated gasoline tax funds in their budgets to interest and sinking fund requirements of bonds.

"As requested by the Board of Administration at a meeting held March 9, 1939, please advise the procedure you consider best for the Board of Administration to use in purchasing bonds under each of the three classifications mentioned above."

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Under the conditions set forth in numbered paragraph 1, it is not necessary that the Board of Administration go through any particular formality before purchasing bonds. As trustees, they are bound to exercise reasonable business judgment. In the exercise of this power, the Board is authorized to send out requests for offerings to bondholders or bondbrokers, or the Board may publish a notice calling for offerings, or it may adopt both of the above mentioned methods. The methods employed by the Board to obtain offerings of bonds is a matter in its discretion, for the Act lays down no mandatory procedural requirements respecting the investment of interest and sinking funds.

Under the conditions set forth in numbered paragraph 2, it is necessary for the Board of Administration to comply with certain formalities in purchasing bonds with Kanner Bill funds. These requirements are set forth in Section 14 of Chapter 14486, Laws of Florida, Acts of 1929, as amended, and include the publication of a newspaper notice,

Under the conditions set forth in numbered paragraph 3, it is not at all certain that these funds are available for the purchase of bonds under the Kanner Bill, for in the case of *State, ex rel. Florida National Bank v. Sholtz*, 156 So. 15, the Supreme Court held that where the gasoline taxes have been duly budgeted and appropriated in the county's annual budget, the county could not thereafter direct that these funds be used for the purchase of bonds under the Kanner Act. On the other hand, it is not certain that these funds are properly in the interest and sinking fund, for in the case of *State, ex rel. Wall v. Sholtz*, 160 So. 877, the Supreme Court held that where a county had inadvertently budgeted its gasoline taxes to the payment of bonds, it could, by subsequent nunc pro tunc order, withdraw this appropriation and make the funds available for the purchase of bonds under the Kanner Act. In view of these decisions and the uncertainty as to what the Court might hold, where the appropriation of the gasoline taxes to the payment of bonds and the adoption of the Kanner Act occur simultaneously, the safest procedure to follow would be for the Board of Administration not to use these gasoline taxes for investment purposes, unless and until the county had invoked its power to partially rescind its action in operating under the Kanner Act, by authorizing a transfer of Kanner Bill funds to the interest and sinking fund. After this step is taken, the Board may follow the same procedure as is set forth in answer to the first numbered paragraph of your letter.

April 19, 1939—O-849.

**TRANSFER OF FUNDS AND PURCHASE OF BONDS—
HERNANDO COUNTY**

Dear Sir:

In your letter of April 19 you ask to be advised as to whether or not the Board of Administration is authorized to comply with a resolution of the

STATE OFFICERS — Board of Administration

Board of County Commissioners of Hernando County, requesting it to transfer funds from the Kanner Bill account of the county to the Interest and Sinking Fund thereof, and to purchase and cancel certain county road bonds which were accepted in payment of taxes and are now held by the Board of County Commissioners, at a definite price, which price is in line with the current market price thereon.

I am of the opinion that the Board of Administration is legally authorized to comply with the provisions of the aforesaid resolution and make the transfer, purchase and cancellation called for therein.

April 22, 1939—O-850.

APPLICATION OF SPECIAL LEVY COMMANDED IN CASE OF
MEREDITH V. ST. LUCIE COUNTY—TWO CASES—NO.
598-L AND 664-L—CIRCUIT COURT ST. LUCIE
COUNTY

Dear Sir:

From your letter of March 28, the resolution enclosed therewith and the information subsequently furnished, it appears that Meredith procured a peremptory writ of mandamus against the county commissioners of St. Lucie County, commanding a special tax levy for the payment of certain described original bonds of St. Lucie County Special Road and Bridge District No. 5 bonds owned by him. The tax was levied and the proceeds, amounting to \$25,966.40, are held by the Board of Administration. The attorneys for the relator and the county have executed a stipulation consenting to the use of these funds for the payment of any coupons clipped from these St. Lucie County Special Road and Bridge District No. 5 refunding bonds, which may be presented directly to the Board of Administration or to the paying agent. The total past due interest on the entire issue of refunding bonds amounts to \$40,680, but the past due interest coupons on the refunding bonds that have actually been exchanged amount to only \$20,580.00.

The funds involved are the proceeds of a levy made especially for relator's benefit, pursuant to a peremptory writ of mandamus, and the other creditors have no rights in or to the proceeds thereof. Through the stipulation, the relator and the county which levied the tax have consented to the use of the funds in payment of interest on exchanged refunding bonds issued to take the place of the issue of bonds of which some are described in the peremptory writ.

You ask to be advised as to whether the Board of Administration may comply with the provisions of the stipulation. Since no other creditor has a specific interest in the funds, and since the county which levied the tax and the bondholder for whose benefit it was made, have agreed to the use of the funds for the payment of interest on refunding bonds, I see no legal objection to the use of the funds as contemplated by the stipulation.

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It will be necessary for the Board of Administration to be furnished with the exact description of the interest coupons which are to be paid, inasmuch as Section 15 of the Board of Administration Act requires the warrant to describe the particular securities to be paid.

What has been said above regarding Special Road and Bridge District No. 5 is also applicable to the special tax levied to pay certain described countywide bonds of St. Lucie County.

June 23, 1939—O-389.

DUTIES OF THE BOARD WITH RESPECT TO PAYMENT OF INTEREST AND PRINCIPAL ON REFUNDING AND ORIGINAL BONDS

Dear Sir:

This is in reply to your letter of June 23, 1939, requesting instructions as to the duties of the Board with respect to the disbursement of funds under certain factual conditions stated therein.

It seems clear that in a county or district where all original bonds have been surrendered and exchanged for refunding bonds, that funds in the Kanner Bill account may be transferred to the interest and sinking fund, and remitted to the paying agent to pay presently accruing interest on refunding bonds, pursuant to resolution of the county commissioners requesting that this action be taken.

From the statement contained in your letter showing the requirements of District No. 8 and the existing balances, I am of the opinion that the Board of Administration would not be authorized to comply with a resolution of the county requesting the transfer of sufficient funds from the Kanner Bill account to the interest and sinking fund, to pay the currently accruing interest on the issue of refunding bonds. Such a resolution makes no provision for the interest on the unrefunded bonds. I am of the opinion that your first question with respect to District No. 8 should be answered in the negative.

Answering your second question regarding District No. 8, I beg to advise that if the county commissioners were to pass a resolution authorizing the transfer of sufficient funds to pay past due and currently maturing coupons on the old bonds, together with presently accruing interest on the refunding bonds, I am of the opinion that the Board of Administration would be authorized to remit both amounts to the paying agents. The statute contemplates that applicable available funds will be remitted to the paying agent prior to the maturity date. If the paying agent is no longer in existence, or if there is reason to believe that the coupons will not be presented for payment at the paying agent bank, the Board would be justified in setting aside the funds for the payment of these coupons for that purpose. In the absence of unusual circumstances, the Board's statutory duty is to remit the funds to the paying agent.

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From your statement with respect to District No. 10, it appears that combined funds in the sinking fund and in the Kanner Bill account are insufficient to pay in full past due principal, past due interest on original bonds and current interest on original and refunding bonds. The county has asked that sufficient funds be transferred from the Kanner Bill account to pay accruing interest on the refunding bonds.

Your third and fourth questions are substantially the same as to District No. 10, as your first and second questions were with respect to District No. 8, and should be answered in the same way. The presence of past due principal would not justify action being taken which was not deemed proper where no past due principal existed.

Replying to the first part of the fifth question, as to whether or not the Board would be justified in making available interest at the refunding rate to holders of interest coupons at the original rate, upon complete surrender of the entire coupon, I am of the opinion that such action is not authorized on the part of the Board of Administration.

Replying to the second part of the fifth question, I am of the opinion that interest at the refunding rate can be made available to the holders of original interest coupons, upon endorsement of the coupon with the amount paid thereon.

Replying to the third part of the fifth question, I know of no authority by which the county would be authorized to issue scrip to take the place of the unpaid part of any interest coupon upon which a partial payment was made.

In reply to your sixth question, I am of the opinion that where available funds are insufficient to pay currently accruing interest on refunding and original bonds, and also past due interest on original bonds, the Board of Administration may, in the exercise of its discretionary power to minimize defaults, apply the available funds to the payment of current interest on the refunding and original bonds.

Your seventh question asks if it is the mandatory duty of the Board to simultaneously remit funds for the payment, at face value, of all past due coupons and currently maturing coupons from original bonds at the time remittance is made for currently maturing coupons on refunding bonds. If ample funds are available, this question should be answered in the affirmative. Where ample funds are not available, the answer to this question is covered in my answer to questions 5 and 6.

Your eighth question asks to be advised as to whether or not past due principal must be paid simultaneously with past due and presently accruing interest. I am of the opinion that if ample funds are available for the payment of all past due and presently accruing obligations, both principal and interest, the Board of Administration should take the necessary steps to pay same. If sufficient funds are not available for this purpose, past due and currently accruing interest may be paid in preference to past due principal.

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July 1, 1939—O-443.

DISTRIBUTION OF SURPLUS FUNDS—COLLIER COUNTY—SECTION 14 OF CHAPTER 14486 AS AMENDED—SENATE BILL NO. 1218, ACTS OF 1939

Dear Sir:

This is in reply to your letter of June 13, 1939, reading as follows:

"The Board of Administration has a surplus over and above current interest and sinking fund requirements of Collier County bonds amounting to approximately \$61,000, which surplus has been accumulating from gasoline tax funds received May 25, 1939, and for several months prior thereto.

"As requested by the Board of Administration at a meeting held today, please furnish this office with your opinion as to whether or not the Board of Administration would be legally authorized to remit \$41,000 of the present surplus to the Board of County Commissioners of Collier County."

At the time the surplus came into existence, Section 14 of Chapter 14486, Acts of 1929 as amended, provided that the surplus should be remitted to the county. On June 9, 1939, subsequent to the accrual of the surplus, Section 14 of said Act was further amended by Senate Bill 1218, Acts of 1939, which provided for 80 per cent of surplus funds to go to the State Road Department, for the construction of certain roads within the county, and 20 per cent to go to the county, for the construction or maintenance of roads within the county.

The question for determination is whether or not the \$41,000 should now be remitted to the county commissioners. The answer depends upon the effect of Senate Bill 1218 on these funds.

At the time the county commissioners requested the distribution, it was the Board of Administration's duty to comply with the request, for the law then in effect provided that the entire surplus should be remitted to the county. Unquestionably at the time the request was made, the county commissioners had the right to have the Board of Administration perform this duty, but before the distribution was actually made, Senate Bill 1218 became a law. If this right was destroyed by Senate Bill 1218, that Act must be given a retroactive construction. See 59 Corpus Juris, 1158, 25 R. C. L. 785.

A construction which gives a statute a retroactive operation, is not favored. Such a construction will not be applied unless plainly intended by the Legislature. See 25 R. C. L. 786, 59 Corpus Juris 1161-1167, *In Re Seven Barrels of Wine* (Fla.) 83 So. 627. This is also true of an amendatory Act. 59 Corpus Juris 1181-1182, 25 R. C. L. 795.

I have taken into consideration the last paragraph in Section 1 of Senate Bill 1218, and find nothing therein which expressly, or by necessary implication, provides for retroactive operation to be given to the Act.

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In construing statutes affecting the laws of descent and distribution, it is fundamental that the law in effect at the time of the ancestor's death governs, rather than the law at a subsequent time. 18 Corpus Juris 803, 16 Amer. Jurisprudence 787. The surplus gasoline tax funds should be distributed in accordance with the law in effect at the time when the surplus accrued, rather than in accordance with a subsequent law.

July 1, 1939—O-444.

**DISTRIBUTION OF SURPLUS GASOLINE TAX FUNDS—SENATE
BILL 1218, ACTS OF 1939—HAW CREEK SPECIAL ROAD
AND BRIDGE DISTRICT**

Dear Sir:

From your letter of June 16, 1939, it appears that funds for the payment of July 1st interest on the bonds of this district have been remitted to the paying agent; that the January interest will amount to \$2580.00; that fourteen bonds mature on July 1, 1940; that the existing balance to the credit of the district is \$37,631.78, and that the district receives gasoline taxes each month, ranging from \$1700.00 to \$2000.00. The county commissioners did, on June 5, 1939, request the Board of Administration to remit to them \$10,000.00 of surplus funds, pursuant to the provisions of Chapter 14486, Laws of Florida, Acts of 1929, as amended. The bonds of this district mature serially, with approximately the same number maturing each year until 1946, when the last bonds of the issue become due and payable.

You ask to be advised as to how to determine whether or not a surplus exists, and also to be advised as to the authority of the Board of Administration to comply with the request of the county commissioners.

Funds to the credit of the district, and any funds hereafter credited to it, should be so administered that currently maturing principal and interest will be paid on the due date, and so that an adequate sinking fund will be maintained to redeem future maturing bonds. When adequate funds for these purposes have been set aside, any additional gasoline taxes received by the Board of Administration constitutes surplus funds within the meaning of that term as used in Section 14 of Chapter 14486, Acts of 1929 as amended.

The Act is silent as to how often the determination and the distribution of surplus gasoline taxes should be made, and the Board has a measure of discretion in this matter. It should be so exercised as to assure the prompt payment of interest and principal as it matures and the maintenance of an adequate sinking fund for the redemption of future maturing bonds of issues of term bonds. Thus it is apparent that this district has a surplus considerably in excess of \$10,000.00. I am of the opinion that the Board is authorized to remit the \$10,000.00 surplus requested to the Board of County Commissioners of Flagler County. See my opinion dated today, regarding the distribution of surplus funds to Collier County.

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July 12, 1939—O-453.

GASOLINE TAX—CHAPTER 19154 REPEALED BY CHAPTER 19279*Dear Sir:*

This is in reply to your letter of July 7, enclosing copy of Chapter 19154, Acts of 1939, approved May 25, 1939. You ask to be advised as to whether or not the Board of Administration is authorized to comply with the provisions of this Act by remitting one-half of the gasoline taxes collected during the month of June, to the Board of County Commissioners of St. Johns County.

Senate Bill 1218 (Chapter 19279), amending Section 14 of Chapter 14486, Acts of 1929 (Board of Administration Act), contains the following statement:

"No second gas tax funds, placed to the credit of the several counties, which funds are administered by the State Board of Administration, shall be used for any other purpose than as expressly provided in this Section 14, any law or laws of the State of Florida to the contrary notwithstanding."

I am of the opinion that Senate Bill 1218 (Chapter 19279), which became a law June 9, 1939, impliedly repealed Chapter 19154.

July 14, 1939—O-469.

**EFFECT OF CHAPTER 19279 UPON USE OF GASOLINE TAXES TO
PAY BANK SERVICE CHARGES, TAX ASSESSORS'
COMMISSIONS, TRAVELING EXPENSES,
AND REFUNDING FEES**

Dear Sir:

This is in reply to your letter of July 13, 1939.

It calls my attention to the fact that for the past several years the Board of Administration has paid:

1. Bills of paying agent banks for services in connection with payment of bonds and coupons.
2. Bills for commissions of tax assessors for paying road and bridge bond assessments.
3. Fees earned by refunding agents pursuant to contracts between the county and agent.
4. Traveling expenses of Attorney General's office in connection with litigation necessary to protection of funds administered by Board of Administration.
5. Telephone and telegraph charges in connection with transfers of moneys to paying bank where necessary to prevent defaults.

Your letter also calls my attention to Chapter 19279, Laws of Florida, Acts of 1939. That Act amends Section 14 of Chapter 14486, Acts of 1939,

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(Board of Administration Act) by providing that 80% of surplus funds be remitted to the State Road Department and the remaining 20% be remitted to the county. The amending Act also contains the following language:

"No second gas tax funds, placed to the credit of the several counties, which funds are administered by the State Board of Administration, shall be used for any other purpose than as expressly provided in this Section 14, any law or laws of the State of Florida to the contrary notwithstanding."

The primary duty of the Board of Administration is to transmit available funds to the paying agent prior to the maturity date of the bonds and interest coupons. Payment of expenses such as are listed in paragraphs 1, 4 and 5 are essential to the carrying out of this primary duty. I am of the opinion that the Board of Administration is authorized to use gasoline taxes in the interest and sinking fund of the county or district in payment therefor.

The tax assessor is entitled to his statutory commissions for assessing bond taxes. I am of the opinion that gasoline taxes credited to the interest and sinking fund of the county or district may be used to pay the tax assessor's commissions mentioned in paragraph 2. See *Coppedge, et al., v. State ex rel., Bowlen*, 127 So. 319.

The Supreme Court has upheld the right of a taxing unit to enter into a contract with a refunding agent for the refunding of bonds by the agent and payment of the fee by the taxing unit. In *Pierce, et al., v. Isaac*, 184 So. 509, the Court upheld the validity of such a contract calling for the payment of the refunding fees out of funds in the hands of the Board of Administration. In a later opinion in the same case, (184 So. 669) the Court enjoined the taxing unit from requesting the Board of Administration to pay the refunding fees out of funds *then* on hand, but there is nothing in the subsequent opinion to indicate that the Court felt that the fees could not be paid by the Board of Administration out of funds subsequently accruing to the credit of the district and, in fact, briefs for counsel on both sides conceded that this was proper. I am of the opinion that refunding fees lawfully due and payable pursuant to contract between the refunding agent and the taxing unit may be paid out of gasoline taxes to the credit of the interest and sinking fund of that taxing unit.

Chapter 19279 was passed as an amendment to Section 14 of the Board of Administration Act, which provided, among other things, for the distribution of "surplus" funds to the county. The only change made by the amending Act was the provision calling for 80% of the surplus to be distributed to the Road Department and insertion of the language quoted previously in this opinion. There is nothing in the Act to indicate that its purpose was to prohibit the use of gasoline taxes for purposes which had uniformly heretofore been considered as proper under the Board of Administration Act, which was the *general* law on the subject. My opinion is that this language was inserted for the purpose of preventing the diversion of gasoline taxes for purposes and in proportions not authorized by the general law, but purportedly sanctioned by *special* Acts. The language used, in my

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opinion, repealed all such special Acts and thus eliminated the question of their constitutionality, a question which has never been conclusively determined in view of the split decision in the case of *State ex rel. Harrell v. Cone, et al.*, 177 So. 854, and companion cases. See my opinion dated July 12, 1939, holding the Act in question repealed a special Act providing for a different method of distributing gasoline taxes credited to St. Johns County.

July 10, 1939—O-459.

**BOARD OF ADMINISTRATION—RETURN TO COUNTY OF BONDS
ERRONEOUSLY DELIVERED**

Dear Sir:

This is in reply to your letter of June 10, 1939, reading as follows:

"On December 31, 1936, Hon. Miles Warren, who was then Clerk of the Circuit Court of Indian River County, delivered certain bonds and coupons to this office with the verbal advice that same belonged to the various interest and sinking fund accounts of Indian River County supervised by the Board of Administration.

"A letter dated October 26, 1938, from Hon. W. M. Wainwright, State Auditor, is to the effect that some of such bonds and coupons properly belong to funds administered by the Board of County Commissioners and not by the Board of Administration.

"At a meeting held yesterday, the Board of Administration requested that you furnish an opinion as to whether or not it would be authorized to return to the Board of County Commissioners the bonds and coupons described in the attached resolution adopted by the Board of County Commissioners May 2, 1939.

"With your reply, please return the attached copy of resolution."

Such of the bonds delivered to the Board of Administration as were assets of accounts administered by the Board, were properly delivered to it by the Clerk of the Circuit Court. Any bonds which did not come within the above classification, should not have been delivered to the Board of Administration, and the retention of such securities is not a duty of this Board.

Such bonds as the State Auditor determines are the property of funds administered by the county commissioners, and not by the Board of Administration, may be returned to the county commissioners as requested. I do not attempt to pass upon which of the bonds described in the resolution should be returned. That determination is a question of fact, rather than of law, and should be worked out with the Auditing Department in accordance with the ruling expressed in this opinion.

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July 11, 1939—O-461.

REFUND OF TAXES AUTHORIZED, CHAPTER 18956*Dear Sir:*

From your letter of June 13th and the resolution enclosed therewith, it appears that the Board of County Commissioners of Union County have, by resolution, authorized and requested the Board of Administration to refund to certain persons named therein, taxes totaling \$134.68, derived by reason of a 74-mill tax levy made pursuant to a peremptory writ of mandamus, which tax levy was subsequently revoked. The resolution requests that refund be made in accordance with Chapter 18956, Acts of 1937, which authorizes the refund of these taxes.

You ask to be advised as to whether or not the Board of Administration would be legally authorized, pursuant to Chapter 18956, to refund the taxpayers named in the resolution, the amounts specified therein. I am of the opinion that the Board of Administration would be authorized to take this action.

August 9, 1939—O-840.

PAYMENT OF REFUNDING FEES—LEE COUNTY*Dear Sir:*

This is in reply to your letter of August 9, enclosing copy of contract entered into between Lee County and Messrs. Jackson J. Sells and William H. Reynolds, which contract modifies the previous contract entered into by the same parties, for the refunding of the road bonds of Lee County; certificate of the Clerk of the Circuit Court, describing the bonds exchanged pursuant to said modified contract; and resolution of Board of County Commissioners requesting the Board of Administration to pay the refunding agents \$2280.00 as compensation under said contract for procuring the exchange of 114 bonds.

You ask to be advised as to the authority of the Board of Administration to comply with said resolution. I am of the opinion that the Board of Administration is authorized to make the payments requested therein. See my opinion dated July 5, 1939, regarding the payment of Refunding Fees in Lee County, found at page 452 of the 1937-1938 Attorney General's Report.

August 10, 1939—O-854.

REFUNDING EXPENSE—VOLUSIA COUNTY*Dear Sir:*

This is in reply to your letter of August 9, to which is attached certified copy of resolution of Board of County Commissioners of Volusia

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County, requesting the Board of Administration to pay refunding expenses listed therein. The first two items are for publication of notice in the Bond Buyer and costs for printing bonds. These items appear to be necessary and regular expenses in connection with the refunding program, and may be paid by the Board of Administration out of applicable funds. The remaining items appear to be expenses incurred in connection with a suit brought upon certain unexchanged bonds, which suit was subsequently dismissed. In my opinion, these expenses are not properly payable by the Board of Administration.

August 18, 1939—O-548.

AUTHORITY TO PURCHASE INTEREST COUPONS UNDER
CHAPTER 15891 (KANNER ACT),—BROWARD COUNTY

Dear Sir:

This is in reply to your letter of August 11, in which you state that pursuant to the Kanner Bill, the Board of Administration has been offered some Broward County bonds and Broward County coupons at a price of \$850 for the \$1000 bond, plus \$850 for each \$1000 of past due coupons. Your letter also states that the offerer expects to receive eighty-five cents on the dollar for accrued interest from July 1, 1939, to August 1, 1939. Under this set of facts, you ask to be advised on the following questions:

1. Is the Board of Administration authorized to purchase under the Kanner Bill past due interest coupons detached from Broward County Highway Bonds?

2. Is the Board of Administration authorized to purchase Broward County Highway Bonds having certain past due coupons detached, at eighty-five cents on the dollar for the bond and eighty-five cents on the dollar for the interest on same to August 1, 1939, whether such interest be represented by coupons or accrued interest since the maturity date of the bonds?

The purpose of the Kanner Act was to authorize the Board of Administration to use available gasoline tax funds to retire the largest amount of outstanding road bond indebtedness with the least amount of money. Keeping this in mind, the Board of Administration is vested with a measure of discretion in expending the funds held in the various Kanner Bill accounts. Since past due interest coupons are outstanding indebtedness of equal dignity with the bond to which they were attached, I know of no legal inhibition against the Board of Administration purchasing this form of road bond indebtedness. Your first question should, therefore, be answered in the affirmative.

Accrued interest which is not evidenced by interest coupons, is a mere contingent liability, and the Board of Administration is not authorized to purchase such interest claims under the Kanner Act. See *State ex rel. Center v. Sholtz*, 156 So. 746; *State, ex rel. Davis v. Lee*, 156 So. 744. Therefore, the amount of accrued interest not evidenced by coupons, may not be considered in determining which is the lowest bid offered. However, if the offered price

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of such a bond is the lowest offered, and is less than the face amount of the bond and the face amount of the interest coupons attached thereto, the Board of Administration is not prohibited from making the purchase simply because the offerer considered the accrued interest in calculating the price at which the bond was offered.

August 18, 1939—O-540.

PARTIAL RESCISSION OF KANNER BILL—MARTIN COUNTY

Dear Sir:

This is in reply to your letter of August 15, from which it appears that Martin County has previously adopted the Kanner Act as to all issues for which it is liable, including the portions of issues assumed as a result of the creation of Martin County from Palm Beach and St. Lucie Counties. Martin County has now adopted a resolution requesting that the part of the Kanner Bill balance applicable to the proportion of the indebtedness assumed from Palm Beach County, be transferred to the interest and sinking fund account and used in the payment of the Palm Beach County indebtedness so assumed. You ask to be advised as to whether or not the Board of Administration may comply with the provisions of this resolution.

Subsection (g) of the Kanner Act authorizes the county commissioners to "amend or modify" its previous action invoking the provisions of the Kanner Act. I am of the opinion that the resolution is in compliance with this provision of the Kanner Act, and that the Board of Administration is legally authorized to comply with the provisions thereof.

August 18, 1939—O-541.

**DISTRIBUTION OF SURPLUS FUNDS PURSUANT TO CHAPTER
19279, WHERE INDEBTEDNESS FULLY PAID—
LA FAYETTE COUNTY**

Dear Sir:

This is in reply to your letter of August 9, supplementing your letter of July 18, 1939, in which you ask to be advised as to whether or not the Board of Administration is authorized to remit 80 per cent of the balance in the hands of the Board of Administration, to the State Road Department, and the remaining 20 per cent to the Board of County Commissioners of LaFayette County.

Your letter states that the bonded indebtedness of the county, to which the funds are applicable, has been fully paid. Chapter 19279 became a law on June 9, 1939, and I am of the opinion that 80 per cent of such portion of the existing balance as accrued subsequent to June 9, may be remitted to the State Road Department, and 20 per cent thereof to the Board of County Commissioners. As to that portion of the balance which came into the hands of

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the Board of Administration prior to June 9, I am of the opinion that 20 per cent thereof may be remitted to the Board of County Commissioners, but that the remaining 80 per cent should be held pending disposition of the Petition for Rehearing in the case of State ex rel. Hill v. Cone.

August 18, 1939—O-542.

REMITTANCE OF AUTO TRANSPORTATION TAXES COLLECTED
PURSUANT TO CHAPTER 14764, TO BOARD OF COUNTY
COMMISSIONERS OF COUNTY WHICH NO LONGER
HAS BONDED ROAD DEBT—LIBERTY COUNTY

Dear Sir:

This is in reply to your letter of August 15, which advises that the Board of Administration has on hand a balance of \$317.04 derived from Auto Transportation Taxes collected pursuant to Chapter 14764, and that the bonded road debt of Liberty County, the sinking funds of which are administered by the Board of Administration, has been fully paid. You ask to be advised as to whether or not the Board of Administration may remit this balance, and any future receipts from this source, to the Board of County Commissioners of Liberty County.

I am of the opinion that pursuant to Section 17 of Chapter 14764, you are authorized to remit present balances and future receipts from this source to the Board of County Commissioners of Liberty County.

August 25, 1939—O-549.

INVESTMENT OF FUNDS IN BONDS ACCEPTED AND DISTRIBUTED
UNDER FUTCH ACT (CHAPTER 16252)—
HILLSBOROUGH COUNTY

Dear Sir:

This is in reply to your letter of August 25, 1939, which reads as follows:

"All of Hillsborough County Hard Surface Road Bonds dated October 1, 1913, mature October 1, 1943, and this office holds sufficient cash applicable to this issue to purchase all of the bonds described in the attached resolution adopted by the Board of County Commissioners August 24, which bonds so recommended mature in January, 1943, 1949 and 1968.

"As requested by the Board of Administration at a meeting held today, please furnish your opinion as to whether or not the Board of Administration is legally authorized to purchase the bonds described in the resolution, assuming that the prices are in line. With your reply, please return the attached resolution."

Also attached to the letter is a resolution of the Board of County Commissioners of Hillsborough County, dated August 24, making distribution,

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pursuant to Section 7 of Chapter 16252, Acts of 1933, of the bonds accepted by the Clerk of the Circuit Court of Hillsborough County, for taxes, pursuant to that Act.

The bonds which the Board of Administration is requested to purchase are a portion of the bonds distributed pursuant to the aforesaid resolution.

Assuming that the prices at which the bonds are offered are in line with recent sales, I am of the opinion that the Board of Administration is legally authorized to purchase said bonds as an investment for the interest and sinking fund of the Hard Surface Road Bonds dated October 1, 1913. See my opinion of September 10, 1938, at page 394 of the 1937-1938 Attorney General's Report.

September 1, 1939—O-562.

**MOTOR FUEL TAX ACT—CHAPTER 19446—DISTRIBUTION
OF TAX**

Dear Sir:

This is in reply to your letter of August 31, regarding Chapter 19446, Acts of 1939. It levies a tax upon motor vehicle fuel other than gasoline taxed under Chapter 15659, Acts of 1931. Section 3 of said Act reads in part as follows:

"* * * Second 'Motor Vehicle Fuel' tax: Shall be paid into the 'State Road Distribution Fund,' created by Chapter 15659, Laws of Florida, Acts of 1931.

"* * * The first and second 'Motor Vehicle Fuel' taxes collected under this Act shall be distributed, used and/or appropriated in the same manner as gasoline tax moneys are used, distributed and/or appropriated as provided by Chapter 15659, Laws of Florida, Acts of 1931, and all Acts amendatory thereto. * * *"

Section 9 of Chapter 15659, Acts of 1931, reads in part as follows:

"All moneys provided for hereunder to be credited to the various counties of the State and so paid to the State Treasurer as ex officio county treasurer shall be administered by the Board of Administration, as provided by law."

In reply to your inquiry, I am of the opinion that:

1. The proceeds from this tax will be subject to the provisions of Chapter 15891, Laws of Florida, Acts of 1933, commonly known as the Kanner Bill, and that where the county officials take appropriate action under the provisions of the Kanner Bill, the Motor Vehicle Fuel Tax should be used in purchasing of bonds in the same manner as the gasoline taxes are used.

2. The proceeds derived from the Second Motor Vehicle Fuel Tax should be applied as a credit in reduction of the amount still due to be paid the counties, certified as due under Chapter 15659, Acts of 1931.

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3. The Motor Vehicle Fuel Tax proceeds should not be classified as "gasoline tax money," and should not be classified as "all other receipts," but the proceeds thereof should be given an appropriate designation and placed in the account in which the gasoline tax moneys are retained.

September 12, 1939—O-567.

**PAYMENT OF BONDED INDEBTEDNESS OF MANATEE COUNTY
ASSUMED BY SARASOTA COUNTY, WITH INTEREST**

Dear Sir:

This is in reply to your letter of September 12, reading as follows:

"According to agreement as of March 6, 1939, made between the Board of County Commissioners of Manatee County and the Board of County Commissioners of Sarasota County, Sarasota County agreed to pay Manatee County the proportion of bonded indebtedness assumed by Sarasota County from Manatee County at the time of creation of Sarasota County, with interest at the rate of 5% per annum subject to a lower rate of interest in the future conforming to the interest rate of Manatee County bonds. It appears that this agreement was ratified in Manatee County Circuit Court July 7, 1939.

"As requested by the Board of Administration September 9, 1939, please furnish your opinion as to whether or not the Board of Administration will be authorized to pay interest on Sarasota County's proportion of indebtedness assumed from Manatee County.

"Please refer to your opinion of April 1, 1939."

I am of the opinion that the Board of Administration is authorized to pay interest on Sarasota County's proportion of the indebtedness assumed from Manatee County, as set forth in the agreement ratified by the Court.

September 26, 1939—O-573.

**ACCEPTANCE OF FUNDS FROM COUNTY IN ORDER TO MEET
MATURITY—SALE OF BONDS PURSUANT TO
CHAPTER 17727—DADE COUNTY**

Dear Sir:

This is in reply to your letter of September 26, which reads as follows:

"Dade County no longer participates in the second gas tax funds for bond purposes. Countywide bonds of Dade County and interest coupons maturing October 1 amount to \$251,867.50. This office has only \$76,422.43 to apply on this indebtedness. The Board of County Commissioners has tendered the Board of Administration a check amounting to \$78,300, representing an offer made by that board to the Board of Administration for \$87,000 City of Miami Refunding Bonds now held as an investment for countywide bonds of Dade

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County, such check being drawn on 'Dade County Interest and Sinking Fund General Account.' The acceptance of this check by the Board of Administration would increase the cash amount required to pay the October 1 maturities and leave \$97,145.07 to be provided for, and we have received a check for this amount from the Board of County Commissioners drawn on the 'Dade County Interest and Sinking Fund General Account.'

"Chapter 17727, Acts of 1937, authorizes the Board of Administration to sell or trade any investments held in the Interest and Sinking Fund Accounts of Dade County.

"Please furnish this office with your opinion:

"1. As to whether or not the Board of Administration would be legally authorized to sell the \$87,000 City of Miami Refunding Bonds to the Board of County Commissioners.

"2. As to whether or not the Board of Administration would be legally authorized to accept the check of the Board of County Commissioners amounting to \$97,145.07 tendered by the Board of County Commissioners in order to prevent defaults on October 1."

I am of the opinion that both questions should be answered in the affirmative.

I express no opinion as to the constitutionality of Chapter 17727, Acts of 1937, as I am of the opinion that public officers are authorized to comply with enactments of the Legislature unless and until the same have been declared unconstitutional by a court of competent jurisdiction.

September 28, 1939—O-587.

**TRANSFER OF FUNDS—CANCELLATION OF BONDS—CHAPTER
19959 AND CHAPTER 19960, ACTS OF 1939—MANATEE COUNTY**

Dear Sir:

This is in reply to your letter of September 12, 1939, in which you inquire as to the authority of the Board of Administration to comply with the request contained in a resolution of the Board of County Commissioners of Manatee County, dated August 21, 1939, and a resolution of the same body dated August 26, 1939.

In reply I beg to advise that I am of the opinion that if and when notice of call of the refunding bonds for redemption on January 1, 1940, is given, the Board of Administration may, after setting aside sufficient funds to meet the call, transfer the remainder of the funds and securities to the 1909 Road Bond account.

I am also of the opinion that the Board of Administration may deliver the Manatee County Board of Public Instruction funding bonds and time warrants to the Board of County Commissioners of Manatee County. Chapter 19960, Laws of Florida, Acts of 1939, authorizes such action.

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I am also of the opinion that the Board of Administration may cancel the bonds held in the account for the payment of which bonds the account was created. The board may also cancel the bonds purchased under the Kanner Act.

I am further of the opinion that the \$32,000 remitted by the county for placement in the 1909 Road Bond Sinking Fund account, may be placed therein by the Board of Administration. Such action is authorized by Chapter 19959, Laws of Florida, Acts of 1939.

September 28, 1939—O-582.

**CHAPTERS 20144 AND 20145 AUTHORIZING DELIVERY OF BONDS
HELD BY BOARD OF ADMINISTRATION TO BOARD OF
PUBLIC INSTRUCTION OF SUMTER COUNTY**

Dear Sir:

From your letter of September 8, 1939, it appears that upon the closing of the Bank of Wildwood, certain securities were taken over by the county officials and later transferred to the State Board of Administration, including \$3,000.00 of bonds of Special Tax School District No. 7 and two notes of Bond Trustees of Special Road and Bridge District No. 4 of Sumter County, which securities have been held by the Board of Administration in the county-wide Road and Bridge Refunding Bond account of Sumter County.

Chapter 20144, Acts of 1939, specifically authorizes and requires the Board of Administration to deliver the \$3,000.00 of bonds to the Board of Public Instruction of Sumter County. Chapter 20145 specifically authorizes and requires the Board of Administration to take similar action with respect to the two notes of Special Road and Bridge District No. 4, totaling \$2,080.00.

I am of the opinion that the Board of Administration is authorized to comply with the provisions of these two Acts. I express no opinion as to their constitutionality, as public officials are authorized to comply with the provisions of legislative enactments unless and until same have been declared unconstitutional by a court of competent jurisdiction.

September 28, 1939—O-577.

**TRANSFER OF FUNDS PURSUANT TO CHAPTER 19039—
PINELLAS COUNTY**

Dear Sir:

From your letter of September 22, it appears that the bonded indebtedness of Pinellas County Road and Bridge District No. 12 has been paid and a cash balance of \$149.97 remains in the account. It also appears that a balance of \$724.81 remains in a special account resulting from a special levy made by the county commissioners of Pinellas County to pay certain Pinellas County bonds

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held by a particular individual. These bonds, it appears, have already been paid and cancelled. You ask to be advised as to whether or not the Board of Administration would be authorized to transfer these amounts and future accruals to these accounts, to other Pinellas County taxing units' accounts under the supervision of the Board of Administration.

I am of the opinion that if proper resolution calling for such action is adopted by the county commissioners, pursuant to paragraph (d) of Chapter 19039, Acts of 1939, the Board of Administration would be authorized to comply with the provisions of such a resolution.

I express no opinion as to the constitutionality of the above mentioned Act, as statutes duly adopted are presumed to be constitutional unless and until declared unconstitutional by a court of competent jurisdiction.

September 28, 1939—O-576.

**PAYMENT OF REFUNDING EXPENSE FROM SPECIAL
TAX LEVY—MARION COUNTY**

Dear Sir:

This is in reply to your letter of September 22, 1939, which reads as follows:

"As requested by the Board of Administration at a meeting held today, please furnish your opinion as to whether or not the Board of Administration would be authorized to pay the attached copy of bill rendered Marion County by Hon. Wallace E. Sturgis amounting to \$3,768.10, dated August 1, 1939, the attached resolution requesting the Board of Administration to pay same out of Marion County Debt Service Fund.

"You will note that the bill rendered by Mr. Sturgis is for legal services rendered in connection with \$375,000 Marion County Road Bonds dated July 1, 1924, maturing July 1, 1939. As information, provision was made to retire said bonds at maturity by the issuance by the county of \$203,000 Refunding Road Bonds and by the Board of Administration paying the remaining \$172,000 of same."

The bill is for services rendered in the matter of the issuance of \$375,000.00 of refunding bonds, including suit for validation thereof, and services in procuring exchange of \$203,000.00 thereof for a like amount of original bonds maturing July 1, 1939. You have attached a certified copy of a resolution of the county commissioners approving payment of the bill.

I am of the opinion that the Board of Administration is authorized to pay the bill out of the proceeds of the special tax levy by Marion County for payment of expense incident to refunding bond operations. See Attorney General's opinion on page 171 of the 1935-1936 Attorney General's Report.

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October 17, 1939—O-848.

**PURCHASE OF JUDGMENT BASED UPON INDEBTEDNESS NOT
CERTIFIED AS OUTSTANDING AT TIME OF EN-
ACTMENT OF BOARD OF ADMINISTRATION
ACT—PALM BEACH COUNTY***Dear Sir:*

This is in reply to your letter of October 9, from which it appears that the Board of Administration agreed to purchase, under the Kanner Bill (Chapter 15891, Acts of 1933), a certain judgment which, from examination thereof, it appears was based upon a check or warrant signed by the chairman of the board of county commissioners and by the clerk, and chargeable against the funds of Special Road and Bridge District No. 17.

This indebtedness was not certified by the county officials to the Board of Administration as being outstanding at the time of the adoption of the Board of Administration Act, as provided by Section 5 thereof, requiring a complete list of every county bond issue issued for road and bridge purposes. I am of the opinion that only bonds so certified by the county commissioners are eligible for purchase under the Kanner Act, and I am, therefore, of the opinion that the Board of Administration is not authorized to purchase the judgment in question.

October 19, 1939.—O-610.

**PAYMENT OF REFUNDING FEES—EXCHANGE OF
SECURITIES—PINELLAS COUNTY***Dear Sir:*

This is in reply to your letter of October 18, enclosing attested copy of resolution of the Board of County Commissioners of Pinellas County, adopted on October 13, 1939. The resolution requests that certain Pinellas County road and bridge refunding bonds dated April 1, 1933, held for the credit of Districts Nos. 1 and 9, be exchanged for a like amount of bonds of District No. 3, held as an investment for the Countywide Interest and Sinking Fund; that after such exchange is made, the bonds first mentioned above be surrendered for redemption pursuant to recent call. The exchange of bonds as above outlined is authorized by Chapter 18791, Acts of 1937, and I am of the opinion that the Board of Administration is authorized to take the requested action.

The resolution also requests that the proceeds from the call of the aforementioned bonds (\$11,000) accruing to the Countywide Interest and Sinking Fund, be remitted to Leedy, Wheeler & Company and Clyde C. Pearce & Company, in partial payment of refunding fees for services performed under their contract with Pinellas County, dated August 25, 1939, copy of which is

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attached to your letter. The contract provides in part that if the refunding agent bids and pays par for the countywide refunding bonds, the county will pay to the refunding agent $2\frac{1}{4}\%$ of the par value thereof, as compensation. From the other papers attached to your letter, it appears that the refunding agents purchased at a price of par plus a premium of \$105.00, \$3,349,000 of the countywide refunding bonds. The proceeds of the sale have been duly received and applied by the county, in redemption of outstanding bonds. I am of the opinion that the Board of Administration is authorized to pay the refunding agents the sum of \$75,352.50, including the \$11,000 received from the call of the countywide bonds previously mentioned, out of funds to the credit of the countywide refunding bonds, if, as, and when sufficient funds are available, without jeopardizing the payment of interest and principal as it accrues.

October 25, 1939—O-619.

**DISBURSEMENT OF TAXES COLLECTED—OCEAN SHORE
IMPROVEMENT DISTRICT**

Dear Sir:

From your letter of October 6 and enclosures, it appears that the Bond Trustees of Ocean Shore Improvement District passed a resolution requesting the county commissioners to levy a tax sufficient to produce \$55,000.00, 4/11 of which should be remitted to the bond trustees, for expenses of the district, and 7/11 of which should be remitted to the Board of Administration for sinking fund purposes. The tax roll showed that the tax levy of 9 mills was for interest and sinking fund purposes, and the tax collector remitted \$3,430.00 on December 28, to the Board of Administration. Subsequently mandamus proceedings were commenced against the tax collector, and the alternative writ commanded her to pay to the trustees of the district 4/11 of all moneys then received or collected under the 9-mill tax. Subsequently a peremptory writ was issued, which commanded the tax collector to pay over to the district "4/11 of all the moneys then received or collected and now held and not disbursed."

The trustees of the district have requested that the Board of Administration pay them 4/11 of the \$3,430.00 remitted to the Board of Administration prior to the issuance of the alternative writ. You ask to be advised as to whether or not the Board of Administration is legally authorized to comply with such request.

The aforementioned funds were remitted to the Board of Administration as interest and sinking funds. It is the duty of the Board of Administration to receive funds of this class, and to disburse them in the payment of bonds. In the absence of court adjudication against the Board of Administration, requiring the funds to be disbursed as requested, I am of the opinion that the Board of Administration should not pay them over to the bond trustees. If,

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on the other hand, the tax collector should request return of 4/11 of this amount, on the ground that it was paid to the Board of Administration by mistake, I am of the opinion that the Board of Administration would be authorized to comply with such request.

October 27, 1939—O-833.

**TRANSFER OF FUNDS AND PAYMENT OF INTEREST—
BREVARD COUNTY**

Dear Sir:

From your letter of October 18, supplementing your letter of September 22, it appears that the Board of County Commissioners of Brevard County have passed a resolution requesting the Board of Administration to transfer sufficient funds from the Kanner Bill account to the interest and sinking fund of the refunding bonds to pay them. It also appears from your letter that after such transfer is made, there will be in the interest and sinking fund sufficient money to pay not only the current interest on the issues of refunding bonds, but also current interest on the unrefunded bonds.

I am of the opinion that the Board of Administration is authorized to make the requested transfer, pay the current interest on the exchanged refunding bonds, and, at the same time, pay current interest on the unrefunded bonds. This action is authorized by my opinion of June 23, 1939, relating to payment of interest on refunding bonds.

November 2, 1939—O-834.

**PAYMENT OF PAST-DUE INTEREST COUPONS FROM ORIGINAL
BONDS—BROWARD COUNTY—SPECIAL ROAD
AND BRIDGE DISTRICT NO. 3**

Dear Sir:

This is in reply to your letter of November 1, 1939, from which it appears that all past-due indebtedness of the above mentioned district has been paid except \$3,300 of interest coupons detached from original bonds. It also appears that the sum of \$40,066 is in the interest and sinking fund, and that the aforementioned interest coupons have been presented for payment.

It is the duty of the Board of Administration, where funds are available, to pay the matured obligations of the district. It appears that ample funds are available, and I am hence of the opinion that the Board of Administration is legally authorized to pay the aforementioned interest coupons of said district.

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November 2, 1939—O-633.

CONSOLIDATION OF SINKING FUNDS—PALM BEACH COUNTY

Dear Sir:

From your letter of October 30 and the resolution of the Board of County Commissioners of Palm Beach County attached thereto, it appears that the Board of Administration is requested to consolidate six countywide road and bridge interest and sinking fund accounts, each of which accounts has heretofore been used exclusively for the servicing of a single issue of bonds. You ask to be advised as to the authority of the Board of Administration to comply with such request.

Each of several statutes, pursuant to which the separate bond issues were issued, provides for an interest and sinking fund to service the bonds authorized to be issued. I am of the opinion that funds duly appropriated to each of such sinking funds, cannot be used for the purpose of paying bonds other than those for the payment of which the sinking fund was created, and I am, therefore, of the opinion that the Board of Administration is unauthorized to consolidate these several accounts.

You also ask to be advised as to whether or not the request contained in paragraph 2 through 6 inclusive of the resolution, may be complied with. These paragraphs authorize and request certain purchases and exchanges between the several district sinking funds. The requested action is authorized by Chapter 19039, Acts of 1939, and I am of the opinion that the Board of Administration is authorized to comply with the request contained in the aforementioned paragraphs.

I express no opinion as to the constitutionality of Chapter 19039, as administrative officers are authorized to comply with legislative enactments unless and until the same have been declared unconstitutional by a court of competent jurisdiction.

Lastly, your letter requests my opinion as to the authority of the board in the event that, during the next fiscal year, the board of county commissioners levies a single tax for all countywide bonds and appropriates all the anticipated gasoline taxes to a consolidated account for all such bonds. In the event of such action on the part of the county commissioners, I am of the opinion that the Board of Administration would have no alternative but to place the avails of such taxes and appropriation in a consolidated account to service the aforesaid six issues of countywide bonds jointly.

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November 3, 1939—O-637.

**SALE OF SECURITIES AND PAYMENT OF REFUNDING FEES—
CHAPTER 19039—PINELLAS COUNTY***Dear Sir:*

This is in reply to your letter of October 27, enclosing copy of a resolution of the Board of County Commissioners of Pinellas County, adopted October 25, 1939. From the letter and resolution, it appears that Pinellas County was indebted to Leedy, Wheeler & Company and Clyde C. Pierce Corporation in the sum of \$75,352.50 for services rendered in refunding the countywide bonds of Pinellas County, upon which indebtedness a partial payment has been made pursuant to opinion of the Attorney General of October 19, 1939. The resolution requests that certain Special Road and Bridge District bonds of Pinellas County now held in the countywide interest and sinking fund, be sold at a price of 93 and interest, and the proceeds used to pay the remaining amount due the aforementioned refunding agents.

Chapter 19039, Acts of 1939, authorizes the sale of securities in the interest and sinking fund of counties in the same population classification as Pinellas County, at public or private sale for cash, at the best price then obtainable. Assuming the bid of 93 to be the best price obtainable, I am of the opinion that the Board of Administration is authorized to comply with the requested sale. I express no opinion as to the constitutionality of the aforementioned Act, as I am of the opinion that administrative officers are authorized to comply with legislative enactments unless and until same have been declared unconstitutional by a court of competent jurisdiction.

The next question is whether or not the proceeds of the sale can be applied to the payment of the refunding fee. It may be so applied if to do so would not jeopardize the payment of interest and principal as it accrues. See my opinion of October 19, 1939, re: Board of Administration—Payment of Refunding Fees—Exchange of Securities—Pinellas County.

November 4, 1939—O-638.

**REMITTANCE TO PAYING AGENT OF LESS THAN MATURING
INTEREST OR PRINCIPAL COMMITMENTS—
PINELLAS COUNTY***Dear Sir:*

This is in reply to your letter of October 27, 1939, to which is attached copy of a resolution of the Board of County Commissioners of Pinellas County, requesting the Board of Administration that at any time sufficient funds are not available to pay interest requirements in full, to remit to the paying agent such amount as is on hand, informing the county commissioners of the amount of the deficit, so that they can remit the difference, and thus

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prevent a default. It also requests that when the Board of Administration receives the amount necessary to make up the deficit, it remit the amount of the deficit to the paying agent.

The Board of Administration is a statutory board having only such powers as are conferred upon it by statute. Its primary statutory duty is to remit funds to the paying agent for the payment of maturing bonds and coupons. If it does not have sufficient funds on hand to pay a particular interest or principal maturity in full, and if the county remits the difference directly to the paying agent, I am of the opinion that the board may remit the funds in its hands, provided instructions are given the paying agent to expend it only in the event the necessary supplemental amount is furnished and actually expended in the payment of the maturing bonds or coupons. As a result of the above procedure, the interest or principal would be paid in full. Since the authority of the board is limited to the payment of outstanding bonds and coupons, it could not, as requested in the resolution, subsequently remit the deficit, for to do so would be remitting funds for the payment of bonds and coupons no longer outstanding.

December 27, 1939—O-850-1

APPLICATION OF SPECIAL LEVY COMMANDED IN MEREDITH
V. ST. LUCIE COUNTY (TWO CASES—596-L AND 664-L),
CIRCUIT COURT, ST. LUCIE COUNTY

Dear Sir:

This is in reply to your letter dated December 20, in which you ask to be advised as to whether or not the funds accruing from a special tax levy made pursuant to peremptory writ, can be used to pay interest on exchanged refunding bonds only, in accordance with the stipulation entered into between the relator bondholder and the respondent county. This precise question was answered in the affirmative in my opinion of April 22, 1939. Inasmuch as that opinion antedates by three days the decision of our Supreme Court in the case of Cone, et al., v. State, ex rel. Massey, 189 So. 44, the effect of that decision upon my previous opinion should be considered. The holding of the opinion of April 22 is contained in the following language:

"The funds involved are proceeds of a levy made especially for relator's benefit, pursuant to a peremptory writ of mandamus, and the other creditors have no rights in or to the proceeds thereof. Through the stipulation, the relator and the county which levied the tax have consented to the use of the funds in payment of interest on exchanged refunding bonds issued to take the place of the issue of bonds of which some are described in the peremptory writ.

"You ask to be advised as to whether the Board of Administration may comply with the provisions of the stipulation. Since no other creditor has a specific interest in the funds, and since the county which levied the tax and

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the bondholder for whose benefit it was made, have agreed to the use of the funds for the payment of interest on refunding bonds, I see no legal objection to the use of the funds as contemplated by the stipulation."

The funds involved in the Massey case were voluntarily levied ad valorem taxes and gasoline taxes, in which funds all bondholders have a common interest, while only the relator had the right to, and interest in, the funds here involved. He and the county levying the tax have consented to the application of these special funds to the payment of interest on exchanged refunding bonds, and not otherwise. I am of the opinion that the Board of Administration is authorized to comply with the provisions of this resolution. Neither the decision of the Supreme Court in the Massey case nor my opinion of June 23, 1939, regarding payment of interest on refunding bonds, is in conflict with this opinion.

November 29, 1939—O-839.

**EXTENSION OF MATURITY DATES ON COUNTY BONDS—
HOLMES COUNTY**

Dear Sir:

This is in reply to your letter of November 15, enclosing copy of resolution of the Board of County Commissioners of Holmes County, which resolution purports to authorize the extension of the maturity dates of the outstanding bonds of Special Road and Bridge District Nos. 3 and 4, and for the attachment of additional interest coupons thereto. A second resolution requests the Board of Administration to agree to such plan as to certain bonds of the aforementioned districts held by the Board of Administration, as investments for Special Road and Bridge District No. 1 of Holmes County. The resolution authorizing the extension of the maturity dates does not purport to be based upon any particular statutory authority. In the absence of a law specifically authorizing the taking of the contemplated action, I am of the opinion that no such authority exists. See *Bay County, et al., v. State*, 157 So. 1. Chapter 17728, Acts of 1937, authorizes the Board of Administration to exchange bonds held by it for refunding bonds. This statute, in my opinion, does not authorize the Board of Administration to take the requested action.

December 1, 1939—O-835.

**TRANSFER OF FUNDS AND PAYMENT OF REFUNDING
INTEREST—CHARLOTTE COUNTY**

Dear Sir:

This is in reply to your letter of November 29, 1939, enclosing copy of a resolution of the Board of County Commissioners of Charlotte County, adopted November 7, 1939.

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You ask for my opinion as to the authority of the Board of Administration to comply with the provisions of Section 3. This section provides in substance that where funds previously remitted to the paying agent bank for the payment of refunding coupons, have been impounded pursuant to mandamus proceedings, the Board of Administration is authorized to transfer from the Kanner Bill account and remit to the paying agent bank, sufficient funds to pay such of the coupons as are actually presented for payment, but not paid because of the impoundment of the funds previously available for this purpose.

I am of the opinion that the Board of Administration is authorized to make such transfer and remittance where a notification is received from the paying bank, that the interest coupons have been presented for payment.

December 16, 1939—O-852.

**TREASURER AS ESCROW AGENT FOR REFUNDING BONDS—ST.
LUCIE, INDIAN RIVER, MARTIN AND OKEECHOBEE
COUNTIES**

Dear Sir:

This is in reply to your letter of December 13, to which are attached several resolutions of St. Lucie County, Indian River County, Martin County and Okeechobee County. At the time of the creation of the three counties last mentioned, they assumed a portion of the indebtedness of St. Lucie County. St. Lucie County is now refunding its debt, including the part assumed by the other counties, and these counties are, in turn, issuing refunding bonds for their proportionate part of the indebtedness assumed.

Your letter asks the following questions:

"1. Whether or not the undersigned has authority to act as escrow agent for Indian River, Martin and Okeechobee Counties and to deliver the Road and Bridge Refunding Bonds to St. Lucie County investment account as requested by the three counties, and to issue a certificate of such delivery of said refunding bonds to the board of county commissioners of the county at interest.

"2. Whether or not the Board of Administration has authority to make a cash payment from Indian River County to St. Lucie County to cover the odd interest adjustment on road and dock bonds dated June 1, 1910, not provided for in the refunding program.

"3. Whether or not the Board of Administration has authority to transfer all funds and investments now credited to the accounts of the original bonds to the accounts of the refunding bonds dated July 1, 1937.

"4. Whether or not the Board of Administration has authority to transfer Kanner Bill funds from the accounts of the said four counties to the interest and sinking fund accounts to pay interest on the refunding bonds."

In reply to the first question, I am of the opinion that the State Treasurer,

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as county treasurer ex officio, has authority to perform the functions mentioned therein. Such procedure was contemplated in the refunding plan and approved by the Supreme Court of Florida, in the case validating the refunding bonds (State v. County of St. Lucie, and three other cases, 183 So. 847).

In reply to the second question, I am of the opinion that the Board of Administration has authority to make a cash payment from the Indian River County account to the St. Lucie County account, in order to cover the odd interest adjustment on road and dock bonds dated June 1, 1910, not provided for in the refunding program. This procedure is in accordance with the agreement of Indian River County to assume a portion of this indebtedness incurred by St. Lucie County.

In reply to the third question, I am of the opinion that the Board of Administration is not authorized to transfer all funds and investments now credited to the account of the original bonds, to the account of the refunding bonds.

In reply to the fourth question, I am of the opinion that the Board of Administration is authorized to make the requested transfers from the Kanner Bill accounts to the interest and sinking funds of the refunding bonds. After such transfer has been made, the disbursement of such funds is subject to the limitations contained in my opinion of June 23, 1939, regarding the payment of interest on refunding bonds, and to the Federal Court injunction in the case of Meredith v. Cone,—United States District Court, Northern District of Florida,—No. 37 Tallahassee Civil.

January 24, 1940.—O-851.

**ST. LUCIE COUNTY—DISPOSITION OF SECURITIES TAKEN
OVER TO SECURE BANK DEPOSITS**

Dear Sir:

This is in reply to your letter of January 24, in which you enclose certified copy of resolution of the Board of County Commissioners of St. Lucie County dated January 5, 1940.

It appears that St. Lucie County bonds, time warrants and District No. 5 bonds, totaling \$18,000 par value, were taken in settlement of an account with the closed Farmers Bank of Vero Beach, and are now held by the Board of Administration as investments for the countywide and district Nos. 2, 3 and 5 issues. The resolution requests that these bonds be sent to the Board of County Commissioners of St. Lucie County.

In reply to your inquiry as to whether or not the board is legally authorized to comply with the request contained in the aforementioned resolution, I beg to advise that in my opinion, the Board of Administration has no such authority. These bonds are held in the sinking funds of the aforementioned issues. There is no authority for sending them to the board of county commissioners.

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March 21, 1940—O-855.

EXCHANGE OF BONDS HELD BY TREASURER PURSUANT TO
CHAPTER 15054, FOR REFUNDING BONDS*Dear Sir:*

This is in reply to your letter of March 19, 1940, enclosing copy of letter from Mr. L. A. Perkins, Jr., Vice President of the Barnett National Bank of DeLand, stating that they are exchange agent for Volusia County Coronado Beach refunding bonds, and requesting that you send in the original bonds held by you for exchange for a like amount of the aforementioned refunding bonds.

It appears that the bonds you hold were received pursuant to Chapter 15054, Acts of 1931, authorizing the acceptance of bonds in payment of taxes. Such Act also provides:

"All bonds, interest coupons, or other evidence of debt acquired and held under this Act by any county or district, shall be within thirty days thereafter forwarded to the State Treasurer who shall keep and hold the same for the account of the parties in interest, as custodian thereof."

Nowhere does this Act specifically authorize their exchange for refunding bonds, and I am of the opinion that the above quoted language shows clearly that no such authority exists.

April 24, 1940—O-794.

TRANSFER OF FUNDS FROM KANNER BILL ACCOUNT TO
INTEREST AND SINKING FUND—BAY COUNTY*Dear Sir:*

This is in reply to your letter of April 19, 1940, enclosing resolution of the Board of County Commissioners of Bay County, requesting the Board of Administration to transfer, from the Kanner Bill account of that county to the interest and sinking fund of the refunding bonds, sufficient moneys to increase such interest and sinking fund account to \$48,152.00, and also to transfer sufficient moneys to replace any moneys impounded while on deposit with the paying agent. In line with previous opinions of this office, I am of the opinion that the transfers requested in the said resolution, may be made. See Attorney General's opinion of April 13, 1938, in re: Hardee County—Transfer of Funds from Kanner Bill Account to Interest and Sinking Fund; also Attorney General's opinion dated December 1, 1939, in re: Transfer of Funds and Payment of Interest—Charlotte County.

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May 30, 1940—O-836.

**ACCEPTANCE OF PLAN OF COMPOSITION SUBSEQUENT TO
ACCEPTANCE OF REFUNDING BONDS — BANKRUPTCY
PROCEEDINGS OF CORAL GABLES—DADE COUNTY***Dear Sir:*

This is in reply to your letter, from which it appears that on January 24, 1939, the Board of Administration accepted the refunding plan of the City of Coral Gables, in lieu of the original obligations held by the Board of Administration for the interest and sinking fund of Dade County. It also appears that certain of the original bondholders declined to accept refunding bonds, and announced an intention to recover full principal and interest. The holders of the refunding bonds accepted a 50 per cent cut in principal at the time of the exchange. The City of Coral Gables has decided to file bankruptcy proceedings to force the holders of the unexchanged original bonds to accept the refunding plan which was accepted by the holders of 95 per cent of the original bonds, including the bonds held by the Board of Administration for the account of Dade County.

The resolution requests the Board of Administration to accept the plan of composition and consent to the filing of the petition in bankruptcy, and you have requested my opinion as to the board's authority to comply with the provisions of the aforesaid resolution.

In view of the fact that the Board of Administration has already accepted the refunding plan, which is the identical plan which the City wishes to advance as a plan of composition with creditors, I am of the opinion that the Board has implied authority to accept the plan of composition and consent to the filing of the petition in bankruptcy. Having already accepted the concessions to the City, contained in the refunding plan, the board has, in my opinion, implied authority to take the requested action, in order that all creditors will be placed upon the same footing and in order that the security behind the bonds which it holds, will not be diminished.

May 30, 1940—O-830.

**AUTHORITY TO EXCHANGE BONDS IN SINKING FUNDS—
BAKER COUNTY***Dear Sir:*

This is in reply to your letter, from which it appears that \$9,000.00 Baker County 5% Special Road and Bridge District No. 1 bonds, dated July 1, 1919, are in default, and that there are not sufficient moneys in the interest and sinking fund account of this district to pay all of these bonds. It also appears that the Board of Administration holds as an investment, for said district, \$29,000.00 of bonds of the same district, maturing July 1, 1940, to July 1, 1949.

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The county has requested that the Board of Administration deliver to the holders of the aforesaid \$9,000.00 of bonds a like amount of unmatured bonds held as an investment for the district, and also pay to the holders of the matured bonds interest from the date of the maturity to the date that interest on the unmatured bonds is evidenced by coupons attached.

In response to your inquiry as to whether or not the Board of Administration is authorized to comply with this request, I beg to advise that in my opinion, the Board of Administration is authorized to make the requested exchange, provided it is made on the basis of par. See Attorney General's opinion dated October 15, 1935, at page 153 of the 1935-1936 Attorney General's Report. However, I am of the opinion that the Board of Administration is not authorized to expend the funds of the district to pay interest on the matured bonds subsequent to the date of maturity thereof. See Attorney General's opinion dated January 11, 1936, at page 147 of the 1935-1936 Attorney General's Report; also *State ex rel. Center v. Sholtz*, 156 So. 746, and *State ex rel. Davis v. Lee*, 156 So. 744.

May 30, 1940—O-837.

**TRANSFER OF FUNDS FROM KANNER BILL ACCOUNT—PAY-
MENT OF INTEREST ON REFUNDING BONDS AND
ORIGINAL BONDS—BREVARD COUNTY**

Dear Sir:

This is in reply to your letter enclosing copies of two resolutions of the Board of County Commissioners of Brevard County, requesting the Board of Administration to transfer certain funds from the Kanner Bill account to the interest and sinking fund accounts of certain refunding bonds and forward to the paying agent sufficient funds to pay currently maturing interest on the refunding bonds.

Your letter states that there has been a complete exchange of the refunding bonds described in the first resolution for the original bonds. The refunding bonds described in the second resolution have not been entirely exchanged for refunding bonds. You request my opinion as to whether or not the Board of Administration is legally authorized to make the requested transfers, and I beg to advise that the board is authorized to do so. You ask also if, after the transfers are made, the Board of Administration is authorized to remit sufficient funds to pay the interest coupons maturing on the refunding bond issues which have been completely exchanged for original bonds, and I beg to advise that the Board of Administration is authorized to take this step.

Your letter also asks to be advised as to the procedure to follow in the event that after the transfer is made, there is sufficient money to pay the currently maturing interest on the exchanged refunding bonds and also the currently maturing interest on the original bonds, at the refunding rate. In my opinion the Board of Administration may adopt any procedure which is

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practical and will make certain that payments made on original bond coupons at the refunding rate will be properly endorsed upon the coupon before it is returned to the holder.

Your letter also requests advice as to the procedure to be followed if the funds requested to be transferred in the second resolution, when added to the balances in the interest and sinking funds, amount to less than that required to pay both classes of coupons at the same rate. I am of the opinion that the Board of Administration is authorized to pay the refunding bond interest at the refunding rate and to make partial payment on the original coupons at the refunding rate, with proper endorsement being made thereon.

May 30, 1940—O-846.

**TRANSFER OF FUNDS FROM PAID OUT ACCOUNT—
PALM BEACH COUNTY**

Dear Sir:

This is in reply to your letter, from which it appears that by resolution of the Board of County Commissioners of Palm Beach County, they have requested that the \$10,000 of Palm Beach County refunding and highway bonds dated July 1, 1915, now in the investment account of the Palm Beach County road bonds dated March 1, 1910, be transferred to the investment account of the Palm Beach County funding and highway bonds dated July 1, 1915. It also appears that the bonds dated March 1, 1910, have been fully provided for.

I am of the opinion that the Board of Administration is authorized to comply with the aforesaid resolution. See my opinion dated May 29, 1940, regarding a similar matter in Duval County.

May 31, 1940—O-817.

**PAYMENT OF REFUNDING EXPENSES OUT OF SPECIAL
FUND—MARION COUNTY**

Dear Sir:

This is in reply to your letter in which you state that you have received a copy of a resolution of the Board of County Commissioners of Marion County dated March 19, 1940, requesting the Board of Administration to pay expenses incident to the refunding of Marion County highway bonds, such as those for legal services, cost of printing the bonds, validation certificates and advertising.

You ask to be advised as to whether or not the Board of Administration is authorized to pay these refunding expenses out of the debt service account, consisting of the proceeds of a 1-mill tax levy, or out of the interest and sinking fund account, consisting of the proceeds of a 15-mill tax levy and also gasoline taxes.

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Your letter states that the 1-mill tax levy is apparently made to defray the expenses of refunding, and if this is the case, I am of the opinion that the Board of Administration is authorized to pay these expenses out of the proceeds of that 1-mill tax. I am further of the opinion that the Board of Administration is not authorized to pay any refunding expenses out of either the 15-mill tax levy or the gasoline taxes in the interest and sinking fund. See opinions of the Supreme Court of Florida, in the case of *Dodge Taylor v. B. A. Williams, et al.*, rendered February 23, 1940, April 2, 1940, and May 17, 1940; also opinion of the Attorney General dated today, in re: Board of Administration—Payment of Refunding Expenses—Pinellas County.

The issuance of refunding bonds by a county is a lawful undertaking involving some expense, no matter how economically this undertaking is performed. The opinions in the Taylor case forbid the payment of this expense out of gasoline taxes and out of ad valorem taxes which have been levied for bond payments. The 15-mill tax was levied for bond payments, and hence cannot be used for refunding bond expenses, but the 1-mill tax levy, on the contrary, was apparently levied for the exclusive purpose of paying the refunding expenses, and, therefore, is not within the scope of the rule laid down in the Taylor case.

If the refunding expenses cannot be paid out of the special 1-mill tax levy, then the county would be in the anomalous position of being legally authorized to issue refunding bonds, but without legal means of raising money to pay the necessary expenses of printing the refunding bonds, etc. I have no doubt of the county's authority to levy a special tax to pay refunding expenses.

May 31, 1940—O-847.

**PAYMENT OF REFUNDING EXPENSES—
PALM BEACH COUNTY**

Dear Sir:

This is in reply to your letter of May 20, 1940, enclosing resolution of the Board of County Commissioners of Palm Beach County, requesting the Board of Administration to pay the sum of \$950.00 of refunding expenses incident to the refunding of Palm Beach County Special Road and Bridge District No. 19 bonds.

In reply to your request for advice as to whether or not the Board of Administration is legally authorized to comply with the provisions of this resolution, I beg to advise that in my opinion the Board of Administration does not have such authority. See opinions of the Supreme Court of Florida, in the case of *Dodge Taylor v. B. A. Williams, et al.*, rendered February 23, 1940, April 2, 1940, and May 17, 1940; also my opinion dated today, in re: Board of Administration—Payment of Refunding Expenses—Pinellas County.

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May 31, 1940—O-844.

PAYMENT OF REFUNDING EXPENSES—PINELLAS COUNTY

Dear Sir:

This is in reply to your letter enclosing copy of a bill from the Bankers Trust Company, New York City, New York, in the amount of \$1,634.74, of which \$1,533.00 represents services for paying \$2,349,000.00 Pinellas County Road and Bridge Refunding Bonds called for redemption October 1, 1939; \$100 for services rendered in obtaining the names and addresses of the owners of the Countywide Road and Bridge Refunding Bonds, as well as the bonds of Special Road and Bridge Districts Nos. 4, 5, 8 and 9, and \$1.74 for mailing the ownership certificates to the Board of County Commissioners of Pinellas County.

You ask to be advised as to whether or not the Board of Administration is authorized to pay these amounts out of the several interest and sinking fund accounts involved.

The primary function of the Board of Administration is to pay bonds as they come due, and I am, therefore, of the opinion that the Board of Administration is authorized to pay that part of the bill totaling \$1,533.00, representing bank's charges for handling the payment of \$2,349,000.00 of Pinellas County bonds.

I am of the opinion that the items of \$100.00 and the item of \$1.74 constitute refunding expenses which are not payable out of the interest and sinking funds of Pinellas County and its special road and bridge districts. See my opinion rendered today with respect to payment of refunding fees in Pinellas County; also opinions of the Supreme Court of Florida, in case of *Dodge Taylor v. B. A. Williams, et al.*, rendered February 23, 1940, April 2, 1940, and May 17, 1940.

May 31, 1940—O-845.

PAYMENT OF REFUNDING EXPENSES—ORANGE COUNTY

Dear Sir:

This is in reply to your letter in which you ask to be advised as to whether or not the Board of Administration is authorized to pay a bill in the amount of \$10.00 to cover the bank's expenses in obtaining the names and addresses of the holders of the Orange County 6 per cent road bonds.

In my opinion this constitutes a refunding expense, the payment of which out of interest and sinking funds in the hands of the Board of Administration, is forbidden by the opinions of the Supreme Court of Florida in the case of *Dodge Taylor v. B. A. Williams, et al.*, rendered February 23, 1940, April 2, 1940, and May 17, 1940. See also my opinion dated today, in re: Board of Administration—Payment of Refunding Expenses—Pinellas County.

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May 31, 1940—O-843.

**SALE OF BONDS—ASSEMBLING FEE—PINELLAS AND
ST. JOHNS COUNTIES***Dear Sir:*

From your letter it appears that the Board of Administration holds as an investment for St. Johns County, \$7,000 Pinellas County Special Road and Bridge District No. 13 refunding bonds dated July 1, 1937, which bonds the Board of County Commissioners of St. Johns County, by resolution, have requested the Board of Administration to sell to Clyde C. Pierce Corporation at par plus accrued interest, plus one point assembling fee.

You ask to be advised as to whether or not the Board of Administration is authorized to sell these Pinellas County Bonds on the basis above set forth. If Clyde C. Pierce Corporation paid to St. Johns County the one point assembling fee, it would, of course, expect to be reimbursed this amount by Pinellas County. In my opinion rendered today, in re: Board of Administration—Payment of Refunding Fees—Pinellas County, I held that the Board of Administration had no authority to pay the one-point assembling fee out of funds in its custody. Since the Board of Administration has no authority to pay Clyde C. Pierce Corporation an assembling fee of one point out of funds of Pinellas County, I am of the opinion that the board is not authorized to sell Pinellas County bonds, held by St. Johns County, to Clyde C. Pierce Corporation on a basis where that corporation agrees to pay a certain price for the bonds, plus an additional one point as an assembling fee.

October 23, 1940—O-967.

**PAYMENT OF INTEREST ON REFUNDING BONDS—
BANKRUPTCY—BAY COUNTY***Dear Sir:*

This is in reply to your letter of October 11, 1940, enclosing a copy of a resolution of the Board of County Commissioners of Bay County, requesting the Board of Administration to cause sufficient funds to be transferred from the Kanner Bill account to the Interest and Sinking Fund account of Bay County road and bridge refunding bonds so as to make available in the latter account the sum of \$48,152.00, the amount necessary to pay the August 1, 1940, interest on the entire issue of refunding bonds.

The resolution also requests the transfer of sufficient funds to replace any funds heretofore impounded.

Your letter states that Bay County has filed a petition in bankruptcy in the United States District Court for the Northern District of Florida, requesting the confirmation of a plan of composition of its debts, and in view of this you ask to be advised as to whether or not the Board of Administration would be authorized to make the transfers requested above.

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I have examined the petition in bankruptcy and the order made by the Court at the time of the filing of the petition, and find nothing therein to prevent the making of the aforementioned transfers.

You also ask to be advised if the board could remit the entire amount, or only enough to pay the interest coupons on the refunding bonds heretofore exchanged, as evidenced by the clerk's certificate.

I am of the opinion that only the amount necessary to pay the exchanged bonds should be so transmitted.

You ask to be advised as to whether or not it would be advisable for the Board of Administration to obtain an order from the Federal Court commanding disbursement of Bay County funds to pay interest coupons on the refunding bonds due August 1, 1940.

From the examination of the petition and the order, I am of the opinion that no such order is necessary, and accordingly do not feel it advisable for the Board of Administration to go to the trouble and expense of attempting to obtain such an order from the Court.

May 31, 1940—O-842.

PAYMENT OF REFUNDING FEES—PINELLAS COUNTY

Dear Sir:

This is in reply to your letter from which it appears that you have been furnished with certified copies of two resolutions adopted by the Board of County Commissioners of Pinellas County, requesting the Board of Administration to pay Leedy, Wheeler & Company and Clyde C. Pierce Corporation an unpaid balance of \$22,197.50 for refunding countywide road and bridge bonds of Pinellas County, pursuant to refunding contract entered into between Pinellas County and said refunding agents; and also to pay said agents a cost item of \$10.00 per \$1,000 bond of Special Road and Bridge District No. 13, allowed as a brokerage service charge to facilitate the exchange of original bonds for refunding bonds of said district, after receipt of certificate from the exchange bank showing the par amount of bonds exchanged.

Your letter requests my opinion as to whether or not the Board of Administration would be authorized to pay these refunding expenses out of the interest and sinking fund accounts of the taxing units involved.

The following is an excerpt from the opinion of the Supreme Court of Florida, rendered February 23, 1940, in the case of Dodge Taylor v. B. A. Williams, et al :

"The law does not contemplate or permit the appointment of a foreign corporation representing 'the holders of a substantial portion of the outstanding bonds' as fiscal agent for the county or districts in managing or controlling any of the official functions involved in the issuing of refunding bonds. * * *"

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"Nor does the law permit the payment of money from the sinking funds of the county or districts as fees for a refunding agent."

In a subsequent opinion in the same case, rendered April 2, 1940, the Court said:

"No part of the proceeds of the second gas tax either before or after allocation can be used directly or indirectly or otherwise to pay commissions, fees or expenses of any nature for the issue, sale or exchange of refunding bonds. * * *"

"The opinion in the Taylor case holds that the 1935 refunding contract, resolution and bonds and the 1939 refunding contract and resolution contain illegal provisions that should be eliminated, viz.: * * * use of interest and sinking funds in paying fees, commissions or expenses for refunding purposes."

In the second opinion on rehearing in the same case, filed May 17, 1940, the Supreme Court of Florida stated:

"Ad valorem taxes levied for, and gas taxes allocated to, county and road and bridge district bond payments, cannot legally be use for refunding bond expenses, or commingled with revenues raised to pay refunding bond expenses."

From a careful examination of the opinion in the above entitled case, I am of the opinion that the Board of Administration is not authorized to pay refunding fees or refunding expenses out of either gasoline taxes in its custody or ad valorem taxes levied for the purpose of paying bonds. All previous opinions of the Attorney General, with respect to payment of refunding fees and refunding expenses, in conflict with the above mentioned opinions of the Supreme Court and this opinion, are hereby expressly overruled.

June 17, 1940—O-826.

NOTICE REQUIRED UNDER KANNER ACT, WHERE DISTRICT LIES IN MORE THAN ONE COUNTY—DE SOTO COUNTY

Dear Sir:

This is in reply to a letter dated today, in which you state that the Board of County Commissioners of DeSoto County authorized an issue of DeSoto County Special Road and Bridge District No. 4 bonds dated May 15, 1918; that subsequently, by the creation of Highlands and Hardee Counties, a portion of the district came within the territorial limits of these newly created counties, and they assumed the payment of a portion of the indebtedness. Your letter also states that pursuant to the provisions of Chapter 15891, Acts of 1933 (Kanner Bill), a notice was published in a DeSoto County newspaper inviting sealed offerings of bonds of said district, to be received in the Board of Administration on May 31. This notice was duly published in DeSoto County, but was not published in Hardee or Highlands Counties. The Board of Administration received offerings pursuant to the notice; and an offer to

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sell certain refunding bonds of the district, dated July 1, 1938, was accepted by the Board of County Commissioners of DeSoto County. The Board of County Commissioners of Highlands County also recommended the purchase of the same securities.

Your letter points out that the notice was not published in either Highlands or Hardee Counties, and you ask to be advised as to whether or not the Board of Administration would be authorized to purchase securities, using gasoline tax funds of both DeSoto and Highlands Counties. Assuming that there are sufficient funds available to make the purchase, and that the items recommended are the lowest offerings, I am of the opinion that the Board of Administration is legally authorized to make the purchase. The Kanner Bill provides that the notice shall be published "in the county where the bonds were issued." Both the original and refunding bonds were issued by the Board of County Commissioners of DeSoto County, on behalf of Special Road and Bridge District No. 4 thereof. That board's authority to issue the refunding bonds was specifically passed upon by the Supreme Court in the case of *State v. Special Road and Bridge District No. 4 of DeSoto County, et al.*, 182 So. 583. I am of the opinion that the publication of notice in DeSoto County only, was sufficient under the law, and that it was not necessary to publish additional notices in Highlands and Hardee Counties.

Your letter also states that you do not have a certificate from the clerk of the Circuit Court of DeSoto County showing which bonds of the refunding bond issue have actually been exchanged for the original bonds, and you ask to be advised as to whether or not the Board of Administration would be authorized to purchase the refunding bonds offered.

The Board of Administration is only authorized to purchase bonds which are legally outstanding, and if any doubt exists as to whether or not the refunding bonds were ever placed in circulation, actual payment therefor should be held up until the doubts are removed by certificate of the clerk with reference to the issuance of the particular bonds to be purchased.

August 30, 1940—O-910.

ACCEPTANCE OF REFUNDING PLAN INVOLVED IN MUNICIPAL
BANKRUPTCY PROCEEDING—ST. JOHNS AND
BERVARD COUNTIES

Dear Sir:

This is in reply to your letter of August 21, 1940, to which is attached copy of a resolution of the Board of County Commissioners of St. Johns County, requesting the Board of Administration to exchange certain City of Arcadia bonds dated June 1, 1925, held by the Board of Administration in the sinking funds of said county, for a like amount of refunding bonds, together with past due interest from December 1, 1930, to July 1, 1937, at 1½%, less an exchange fee of \$20.00 per bond.

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From the correspondence attached, it appears that the District Court of the United States for the Southern District of Florida, has in Bankruptcy Proceeding No. 3068-T-Bankruptcy, entered an interlocutory decree approving a refunding plan authorizing the above exchange terms.

You ask to be advised as to whether or not the Board of Administration is authorized to comply with the before-mentioned resolution. I am of the opinion that the board has such authority, pursuant to Chapter 17728, Laws of Florida, Acts of 1937, which authorizes it to accept refunding bonds in lieu of any investments held in the interest and sinking fund accounts administered by it, by and with the consent of the county owning the bonds.

While this action is authorized, it will not become a mandatory duty of the Board of Administration to perform, unless and until the interlocutory decree is made final.

What has been said above is equally applicable to the Arcadia bonds held in the interest and sinking fund of Brevard County.

September 11, 1940—O-924.

PAYMENT OF INTEREST ON ORIGINAL BONDS AND REFUNDING BONDS—PINELLAS COUNTY

Dear Sir:

This is in reply to your letter of September 11, 1940, from which it appears that \$326,000 of bonds have been called for redemption October 1, 1940. To meet the call, \$322,000 of refunding bonds have been sold at par plus accrued interest, the refunding bonds having October 1, 1940, and subsequent coupons attached. Delivery of, and payment for, the refunding bonds will be made on or about September 23. The bonds being called have attached to them coupon due October 1, 1940, and hence on that date, money for the payment of both the bonds and the October 1, 1940 coupon must be made available at the paying agent bank.

Your letter states that it is anticipated that the accrued interest to the date of delivery of the refunding bonds, is to be turned over to the Board of Administration, and that the face amount of the refunding bonds purchased will be sent to the paying agent bank for the purpose of retiring a like amount of the bonds which have been called.

You ask to be advised as to whether or not the Board of Administration would be authorized to remit funds for the payment of the interest coupon due October 1, 1940, on the existing bonds, and to remit \$4,000 to the paying agent to pay a like amount of the existing bonds called for redemption, but for the payment of which, no refunding bonds have been issued. I am of the opinion that both questions should be answered in the affirmative. Clearly, the holders of bonds which have been called for redemption on October 1, are entitled to payment of not only the bond, but the interest coupon falling due on that date, and any applicable funds may be used for that purpose.

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You also ask to be advised as to whether or not the Board of Administration may accept that part of the purchase price of the refunding bonds representing accrued interest to date of delivery, and use said funds, together with other available moneys in the interest and sinking fund of the district, to pay the October 1, 1940, interest coupons on the \$322,000 refunding bonds to be delivered on or about September 23.

I am of the opinion that the Board of Administration is authorized to do so. A contention that such a plan is illegal because two sets of bonds will be outstanding and result in duplication of interest for a period of approximately one week, is without merit. See *Fleeman v. City of Jacksonville*, 191 So. 840, *State v. City of Miami*, 194 So. 792, and *State v. Special Tax School District No. 3 of Pinellas County*, opinion filed June 28, 1940.

September 16, 1940—O-928.

PURCHASE ST. LUCIE COUNTY BONDS UNDER KANNER ACT
WITH OKEECHOBEE, INDIAN RIVER AND MARTIN
COUNTY FUNDS

Dear Sir:

This is in reply to your letter of August 23, 1940, in which you state that at the time of their creation, Indian River, Martin and Okeechobee Counties assumed a part of the county bonded indebtedness of St. Lucie County. Subsequently St. Lucie County issued refunding bonds to take the place of the original indebtedness, and the other counties issued refunding bonds representing the part of the indebtedness assumed by them. These latter refunding bonds were deposited in escrow with the State Treasurer, for delivery to St. Lucie County on a pro rata basis as St. Lucie County exchanged its refunding bonds for its original bonds and pursuant to the escrow agreement, some bonds of Indian River, Martin and Okeechobee Counties have been delivered to St. Lucie County.

Your letter further states that the Board of Administration invited sealed offerings of St. Lucie County bonds under the Kanner Act, and Indian River, Martin and Okeechobee Counties have recommended the use of Kanner Bill funds credited to them, for the purchase of St. Lucie County refunding bonds offered for sale under the Kanner Act. They further request that the Board of Administration exchange the St. Lucie County bonds purchased for a like amount of Indian River, Okeechobee and Martin Counties' refunding bonds, now held as an investment by St. Lucie County, pursuant to the aforementioned escrow agreement.

You ask to be advised as to whether or not the Board of Administration would be authorized to use Kanner Bill funds of Indian River, Okeechobee and Martin Counties to purchase St. Lucie County Road and Bridge Refunding bonds. In the event such purchase can be made, you ask to be advised as to the authority of the Board of Administration to exchange the St. Lucie County

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refunding bonds so purchased, for a like amount of bonds of the county whose Kanner Bill funds were used in making the purchase.

Indian River, Martin and Okeechobee Counties have entered into an agreement with St. Lucie County whereby their debt to it is evidenced by bonds which are being delivered to St. Lucie County pursuant to an escrow agreement. See *State v. County of St. Lucie*, 183 So. 846. Under these conditions, I am of the opinion that those counties may not purchase St. Lucie County bonds under the Kanner Act. But even if they could be purchased, I am of the opinion that they could not be exchanged for a like amount of refunding bonds issued by the purchasing county, for there is no statutory authority for such exchange.

October 16, 1940—O-955.

TRANSFERS PURSUANT TO PEREMPTORY WRIT OF
MANDAMUS—HARDEE COUNTY

Dear Sir:

This is in reply to your letter of October 3, 1940. It states that the "Board of County Commissioners of Hardee County, acting pursuant to the commands of the peremptory writ of mandamus issued out of the Hardee County Circuit Court in the case of *State ex rel. Meredith, et al., v. Hardee County*, No. 2777, adopted a resolution instructing and directing the Board of Administration to transfer gasoline tax funds from the Kanner Bill account to the interest and sinking fund account of the refunding bonds in an amount which, when added to the funds then in such interest and sinking fund account, would be in an amount equal to the amount required to pay the semi-annual interest on the issue of refunding bonds." It further requested the use of such money for the payment of such interest.

Your letter further states that the requested transfers were made by the Board of Administration, and the interest on the outstanding refunding bonds was sent to the paying agent, but that by reason of the fact that all of the refunding issue had not been exchanged for original bonds, there remained in hand a sum equal to the semi-annual interest on the refunding bonds which were authorized, but had not been exchanged. This sum was segregated and earmarked so as to show its source, and was placed in the "reserve account" of Hardee County, which was established on the books of the Board of Administration subsequent to the Attorney General's opinion of June 23, 1939, and for the purpose of setting up the mechanics to comply with that opinion.

Your letter further states that the board's action in placing the aforementioned funds in the "reserve account" has been questioned on the ground that the moneys, consisting of both ad valorem taxes levied for the purpose of paying the refunding bonds and gasoline taxes transferred from the Kanner Bill Account as aforesaid, are required by the commands of the per-

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emptory writ of mandamus to be used solely for the servicing of the refunding bonds.

The previously mentioned peremptory writ of mandamus required the county commissioners to levy certain ad valorem taxes for the exclusive use of the refunding bonds, and also commanded them to appropriate to the interest and sinking fund of the refunding bonds, as and when needed, sufficient gasoline taxes, so that when combined with the ad valorem taxes, it would provide the amount necessary to pay interest upon the issue of refunding bonds, said appropriation to be made by transfer from the Kanner Bill account.

It further directed that when so appropriated by such transfer, the proceeds of the gasoline taxes so transferred shall be earmarked and placed by the county treasurer ex-officio in a separate fund to be expended solely to pay interest upon the refunding bonds, and shall be disbursed for no other purpose.

In reply to your questions, I am of the opinion that ad valorem taxes raised pursuant to peremptory writ of mandamus exclusively for the refunding bonds and gasoline taxes transferred from the Kanner Bill account to the interest and sinking fund of the refunding bonds pursuant to peremptory writ of mandamus, should not be placed in or allowed to remain in the "reserve account," and that such funds may be used to pay interest on the refunding bonds and for no other purpose.

See my opinion dated May 28, 1940, In Re: "Board of Administration—Payment of Interest on Refunding Bonds—Charlotte County." Also State ex rel. City and County Holding Company v. Board of Public Instruction of Broward County, et al., 163 So. 8; City of Kissimmee, et al., v. State ex rel. Ben Hur Life Association, 163 So. 473; State ex rel. Lawler v. City of West Palm Beach, et al., 170 So. 697, and State ex rel. Harris, et al., v. City of West Palm Beach, et al., 149 So. 338.

This rule applies not only when enough money is transferred to enable payment of interest to be made on the entire issue of refunding bonds, but also when the amount transferred is sufficient to make payment of interest on the refunding bonds which the Board of Administration's records show have actually been exchanged.

October 31, 1940—O-975.

PREFERENCE IN PAYMENT OF JUDGMENTS—
BROWARD COUNTY

Dear Sir:

This is in reply to your letter dated today, which states that there are no defaults in principal or interest on countywide obligations of Broward County under the supervision of the Board of Administration, and that the interest due November 1, 1940, has been remitted to the paying agent. Your letter

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points out, however, that there are three judgments based upon countywide obligations under the supervision of the board, and that the Board of Administration has on hand ample funds to pay all of the judgments, together with interest and principal on any bonds maturing in the near future.

The board of county commissioners has requested the Board of Administration to pay the balance due on one of these judgments (Palmer judgment) out of the special levy account and out of the countywide interest and sinking fund account.

You ask to be advised as to whether or not the Board of Administration would be authorized to pay the Palmer judgment in preference to the other two judgments.

In my opinion no question of preference is involved, since ample funds are available for the payment of all obligations of the county. I am of the opinion that, upon presentation of proper satisfaction of judgment, the Palmer judgment may be paid. I am also of the opinion that the Board of Administration would be legally authorized to pay the other two judgments, upon receipt of proper satisfaction thereof.

November 18, 1940—O-985.

DELIVERY OF REFUNDING BONDS AND REDEMPTION OF
ORIGINAL BONDS PRIOR TO, BUT AS OF, CALL
CALL DATE—MANATEE COUNTY

Dear Sir:

This is in reply to your letter of November 13, 1940.

From your letter the amended resolution of the Board of County Commissioners of Manatee County and the certificate of the First National Bank of Chicago, previously furnished this office, the following facts appear:

The resolution of the Board of County Commissioners of Manatee County states that R. E. Crummer & Company has purchased, at a price of 95.5, \$285,000.00 par value, Manatee County refunding bonds, to refund a like amount of bonds now outstanding, but to be called on January 1, 1941. These refunding bonds are on deposit with the bank, and the resolution authorizes the delivery of the bonds to the purchaser upon payment therefor, such delivery to be made only within thirty days prior to the call date, unless a like amount of original bonds are simultaneously surrendered for redemption, in which case deliveries are to be made as called for and paid for by the purchaser, in the following manner:

The purchaser will pay for the refunding bonds so delivered \$955.00 plus \$20.00, representing six months' interest thereon from July 1 to January 1, or a total of \$975.00. The original bonds surrendered are to be redeemed at par (\$1,000.00) plus interest from July 1, 1940, to January 1, 1941 (\$25.00), totaling \$1,025.00. The difference between the amount realized from the sale and the

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amount necessary to retire the original bond (\$1,025.00 minus \$975.00 equals \$50.00) the Board of Administration is requested to make available by establishing an account with the bank and authorizing the account to be charged with \$50.00 for each such transaction. The resolution further provides that in the event the Board of Administration fails to make this money available, the purchaser may advance it to the bank, which will use the money advanced, plus the proceeds of the sale, to retire the original bonds surrendered, in the manner set forth. The resolution provides that these advancements shall be repaid by subsequent remittances by the Board of Administration to the board's account with the bank, which remittances or reimbursements the bank is to request the Board of Administration to make at the time the bank reports the transaction to the Board of Administration.

From the certificate of the bank the following facts appear:

Refunding bond No. 235 was delivered to the purchaser, who paid \$955.00 plus \$20.00, or \$975.00, for it. Original bond No. B 271 was deposited with the bank, accompanied by an agreement of the owner authorizing redemption and cancellation thereof upon payment of the principal amount plus interest thereon to January 1, 1941, or \$1,025.00. To the \$975.00 was added \$50.00 advanced by the purchaser, and the total of \$1,025.00 was paid by the bank to the holder of the original bond No. B 271, in exchange for and in redemption of the bond and all coupons. The bank cancelled the bond and coupons and delivered same to the Board of Administration, together with a certificate describing the transaction and stating that it expects the Board of Administration to remit \$50.00 to it so that it can make reimbursement to the purchaser.

You ask to be advised as to whether or not you can comply with the request made in the resolution and in the certificate by making reimbursements of this nature.

It requires no more money to carry out the issuance of a refunding bond and the redemption of an original bond in the manner set forth in the certificate, than to carry out the same thing on January 1, 1941. If, on the other hand, delivery of the refunding bonds and payment therefor is made thirty days prior to January 1, as is permitted by the resolution, but the refunding bonds are not redeemed until January 1, when they are callable, the result will be that for thirty days liability will accrue against the county for interest on both the refunding bonds and the original bonds, and thus the cost of completing the refunding will be increased by the amount of thirty days' interest on the refunding bonds. This additional expense, payable from funds in the hands of the Board of Administration, will be eliminated as to all refunding bonds delivered in the manner outlined in the certificate, and I am of the opinion that the Board of Administration may make the reimbursement as outlined in the resolution and certificate and in all similar transactions where the bank furnishes the Board of Administration with the cancelled original bond at the time reimbursement is requested.

STATE OFFICERS — Board of Administration

December 10, 1940—O-1011.

ADJUSTMENT OF INTEREST ON ORIGINAL BONDS—
DE SOTO COUNTY*Dear Sir:*

This is in reply to your letter which reads in part as follows:

"At a meeting held September 30, 1938, the Board of Administration set aside in a liquidation account certain funds applicable to DeSoto County Special Road and Bridge District No. 4 for the purpose of making interest adjustments from the maturity dates of the original bonds to the date of the refunding bonds, pursuant to resolutions adopted by the Board of County Commissioners of DeSoto County, September 20, 1938, paragraph (e) of which reads as follows:

"One year's interest 7/1/37 to 7/1/38 at 5% on \$43,000 aggregate amount of past due bonds which matured 5/15/33 to 5/15/37, inclusive.....\$2,150.00"

"We now have certified copy of a resolution adopted by the Board of County Commissioners of DeSoto County, June 18, 1940, amending the above quoted paragraph (e) to read as follows:

"Evidence of any one year's interest accrual prior to 7/1/38 @ 5% on \$43,000 aggregate amount of past due bonds which matured 5/15/33 to 5/15/37, inclusive\$2,150.00."

"Considering the resolution authorizing the issuance of Special Road and Bridge District No. 4 Refunding Bonds, together with the resolution authorizing the setting up of a liquidation account to make certain interest adjustments since the maturity dates of original bonds, it appears that all bondholders will be treated alike, i. e., payment of interest since bond maturity will be made in cash or in new refunding bonds."

You ask to be advised as to whether or not the Board of Administration would be legally authorized to comply with the amendment.

I am of the opinion that the Board of Administration has such authority. Under the amended resolution, as under the original one, all bondholders will receive equal treatment.

December 5, 1940—O-1008.

ELIGIBILITY OF CERTAIN BONDS TO PARTICIPATE IN BOARD
OF ADMINISTRATION ACT—MONROE COUNTY*Dear Sir:*

This is in reply to your letter enclosing copy of a resolution of the Board of County Commissioners of Monroe County dated August 14, requesting the Board of Administration to include in the outstanding bonds of Monroe County \$29,000 Monroe County Refunding Bonds dated April 1, 1929, which

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were authorized to be issued by the Board of County Commissioners February 6, 1929, and which bonds are not on the list of bonds furnished by the Clerk of the Circuit Court of Monroe County as outstanding on April 1, 1929.

You ask to be advised as to whether or not the board would be authorized to include these bonds in the outstanding indebtedness of Monroe County, in order that they may participate in the gasoline tax distribution.

Section 5 of Chapter 14486, Laws of Florida, Acts of 1929 (Board of Administration Act), provides that within thirty days after the passage of the Act the Clerk of the Circuit Court of each county shall furnish the Comptroller with a detailed list of each issue of bonds of the county.

Section 2 of the same Act defines "bonds," using the following language:

"The word 'bonds' as used in this Act will be construed to include bonds, time warrants, notes and *other forms of indebtedness issued for road purposes or for road and bridge purposes* by any County or Special Road and Bridge District of the State of Florida and outstanding on April 1, 1929." (Italics supplied.)

Section 18 of the same Act reads in part as follows:

"It is the intention of this Act that all indebtedness authorized and outstanding at the time of the passage and approval of this Act, issued for the purpose of constructing roads and bridges within the several counties of the State * * * shall be eligible to participate in the distribution of such money."

In view of the wording of Section 2, the debt due for work performed under a road construction contract meets the requirements of the definition, if it came due prior to April 1, 1929, even though a bond or other evidence of the debt was not executed until after April 1, 1929.

The affidavit dated August 17, 1940, of the chairman of the Board of County Commissioners of Monroe County, who was also chairman during the years 1928-1929, states in substance that the Jenner Brothers contract and the Perky contract were both for road construction, which had been at least 95 per cent completed by April 1, 1929; also that the refunding bond issue of April 1, 1929 (\$57,000) was issued to evidence the aforesaid indebtedness incurred for road purposes prior to April 1, 1929, and outstanding on that date.

The affidavit of the clerk of the circuit court dated November 27, 1940, states that all of the bonds except bonds Numbers 34 and 35 were issued to represent debt due by the county on the Jenner Brothers contract, and so \$55,000 of bonds were issued to represent debt due on the Jenner Brothers contract. From examination of the Jenner Brothers contract, it appears that slightly less than \$167,000 was to be paid by the county for the construction of the road, and payments thereon were to be made by the county as the work and materials were furnished. Had the contract been completed by April 1, 1929, or had the bonds been actually issued prior to that date, all \$55,000 of

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such bonds would have been eligible to participate under the provisions of the Board of Administration Act.

According to the chairman's affidavit, as much as 5 per cent of the total work on the Jenner Brothers contract may have been performed after April 1, 1929, and since we are not advised as to how much, if any, of the debt due for work done after that date was evidenced by refunding bonds, we must assume that all of it was, and that approximately \$8,350 of the bonds were issued to evidence such indebtedness, and hence were not eligible to participate. Twenty-eight thousand dollars of the bonds have been paid by the county without using the facilities of or the funds administered by the Board of Administration. And so we may assume that the \$8,350 of ineligible bonds were among the \$28,000 of bonds so paid, leaving unpaid only eligible bonds issued to evidence debt on the Jenner Brothers contract.

I am of the opinion that on the basis of the facts contained in the aforementioned affidavits, bonds Numbers 28, 30 to 33, both inclusive, and 36 to 57, both inclusive, are eligible to participate in the funds administered by the Board of Administration, and that if and when certification of such bonds is made pursuant to the provisions of Section 5 of Chapter 14486, the Board of Administration will be authorized to include them in the outstanding indebtedness of Monroe County in order that they may be eligible to participate in the gasoline taxes.

Obviously the clerk cannot now comply with that part of Section 5 which requires certification to be made within thirty days from the time when Chapter 14486 became a law, but in the case of *State ex rel. Dupont-Ball v. Carlton*, 150 So. 731, the Supreme Court of Florida held that certification within the time prescribed by statute was not essential.

SECTION 7

State Officers—Board of Commissioners of State Institutions

June 21, 1939—O-392.

AUTHORIZED TO GRANT PERMISSION TO ERECT A CHURCH
UPON STATE PROPERTY*Dear Sir:*

This will acknowledge receipt of your letter of June 20 confirming the action taken at the board's meeting approving in principle the request for the erection of an Episcopal Church on the lands of the Florida State Hospital, as indicated in a copy of a letter that you have attached from Mr. V. G. Lowery, archdeacon, Marianna, Florida. This action was taken subject to my approval as to whether or not this request could be legally granted by the board.

It appears from Mr. Lowery's letter that there are a number of patients in the State Institution at Chattahoochee who are members of his church and to whom the church desires to give spiritual ministrations. The request is:

"It is only requested that permission be granted for the use of one of said sites and not that title be vested in the Diocese. However, it is requested that permission be granted for a length of time not less than twenty-five years in order that the Diocese might be justified in incurring the expense of erecting a suitable building."

The question that arises is:

Would the granting of the permission sought be in conflict with Section 6 of the Declaration of Rights of the Constitution of the State of Florida which provides:

"Section 6. No preference shall be given by law to any church, sect or mode of worship and no money shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian institution."

In answering this question I have endeavored to find if there has ever been a case in the United States upon this particular question that would throw some light upon the proper construction of the above quoted provision of our Constitution.

The only case that I have been able to find is that of *Reichwald v. Catholic Bishop of Chicago, et al.*, 101 N. E. 266, and this case seems to be the only one in the United States as I have checked all other compilations available to me and find that this case is the only one cited.

The facts were that the board of county commissioners had granted the

STATE OFFICERS — Board of Commissioners of State Institutions

request of a Catholic Bishop of Chicago to erect a building for religious worship upon grounds owned by the County of Cook, used as a poor farm. Upon these grounds, consisting of 150 acres, were certain large buildings in which the county was housing and maintaining the poor who were a public charge. Apparently, this provision was inserted in the resolution of the board granting this permission: That similar permission be granted to all religious sects; that the chapels to be built under the direction and supervision of the county architect; plans and specifications be subject to the approval of the county boards; the buildings be of a like character as those upon the grounds; and that the location be designated by the board.

It is claimed: " * * * the permission given to erect a chapel for religious worship and funeral services violates Section 3 of Article VIII of the Constitution, which provides that: 'Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State or any such public corporation, to any church, or for any sectarian purpose.'

"The bill is framed on the theory that the adoption of the report, together with the selection of the particular location and the erection of the building, constitutes a grant or donation of land to a church or for a sectarian purpose."

The Court held:

"The county parts with nothing; it acquires a building. The church acquires nothing; it has a license to erect a building. The Constitution prohibits the county from giving the land to the church; but there is no prohibition against the church giving the building to the county, and this is what the adoption of the resolution by the county board provides for. There is no question of any grant or donation by the county * * *."

It is to be noted that the provisions of the Illinois Constitution are in substance identical with our own. The reasoning of the case that I have quoted construing the same is so sound and logical that I shall follow it.

Therefore, I am of the opinion that the board may, under circumstances similar to those above set out, legally grant this application provided, however, that such grant be subject to the expressed condition that same may be revoked at any time, in which event, the buildings that have been erected upon said property to be immediately removed at no expense to the State or upon failure so to do that such buildings shall become the property of the State of Florida.

STATE OFFICERS — Board of Commissioners of State Institutions

July 26, 1939—O-499.

**NOT AUTHORIZED TO PAY UNEARNED SALARY OF
EMPLOYEE***Gentlemen:*

In reply to a letter requesting my opinion as to whether or not the Board of Commissioners of State Institutions would be authorized to pay a full month's salary to Mrs. Ross, widow of the late Mr. H. W. Ross, who for twelve and a half years was Supervisor of the Construction Department of the Hospital, when in fact Mr. Ross died with only two weeks' salary owing him, I would state that I find no law giving the board authority to pay a full month's salary to anyone under the circumstances outlined in the letter, and I understand it has been the rule in the past not to pay salaries under such circumstances. I am informed that the widow of the late Justice of the Supreme Court, Fred H. Davis, was not paid for the full month's salary, Judge Davis not having earned it at the time of his death, and I am also informed that this same ruling was followed in the death of another State employee, Mr. William Anderson, under the same circumstances.

SECTION 8

State Officers—Board of Conservation

March 21, 1940—O-763.

NOT AUTHORIZED TO CHANGE TERMS OF EXISTING STATUTE
WITH REFERENCE TO FISHING IN ST. JOHNS
RIVER AND LAKE GEORGE*Dear Sir:*

This will acknowledge receipt of your letter of today requesting me to give you an opinion as to whether or not you or the State Board of Conservation has the authority to shorten the closed season as provided by Chapter 19566, Acts of 1939, relating to fishing in the St. Johns River and Lake George.

You state that among other things the bill provided that it should be unlawful to fish with any seine, net, trap or other fishing device other than hook and line, or rod and reel, or trammel net for mullet fishing between the fifteenth day of April and the first day of December of each year.

You state that certain sponsors of the bill and others including certain commercial fishermen have requested that the closed season be shortened for a period of sixty days.

In reply I wish to advise that my opinion bearing this date captioned as follows: "State Board of Conservation—Supervisor Thereof—No Authority To Change Terms of Existing Statute with Reference to Closed Season on Shad" covers the question involved, and under my ruling in said opinion, I answer your question in the negative.

March 21, 1940—O-764.

SUPERVISOR NOT AUTHORIZED TO CHANGE TERMS OF
EXISTING STATUTE WITH REFERENCE TO
CLOSED SEASON ON SHAD*Dear Sir:*

This will acknowledge receipt of your letter of today requesting my opinion as to whether the writer of the State Board of Conservation has the authority to extend the fishing season for shad in view of the existing laws.

You state that the 1939 session of the Florida Legislature passed Chapter 19630 regulating the taking of shad and further that a previous law provided a closed season on shad from April 1st to December 1st of each year and this closed season was not affected by the passage of Chapter 19630. You state further that certain Representatives and Senators are requesting that the closed season on shad be shortened thirty days and that a petition is being circulated by commercial fishermen to supplement the request of said Senators and Representatives.

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In reply I wish to advise that this office has ruled on many occasions that administrative officers should follow the Acts of the Legislature so long as they remain on the statute books regardless of the personal opinion of the administrative officers as to the constitutionality or wisdom of the Act in question.

I am, therefore, of the opinion since there is on the statute books a law providing for a closed season on shad from April 1st to December 1st of each year that neither you nor the board has any authority to change the terms of said Act.

June 19, 1940—O-828.

SALT WATER FISH—VALIDITY OF CHAPTERS 15635, 17933-4-5-6
AND 19425, 19427

Dear Sir:

In a letter addressed to me by your Supervisor of Conservation, I have been asked whether certain specified Acts of local application affecting salt water fish are constitutional. The particular Acts to which reference has been made permit all-the-year fishing for mullet and salt-water trout, whereas, by general law certain closed seasons have been set.

One of the earlier of these Acts is Chapter 15635, Acts of 1931, which permits fishing all year for salt-water trout in each county having a population of more than 5,465 and less than 6,280 "according to the last official State census." Under the 1925 census, which was the "last official State census," when the Act was passed in 1931, Baker County had 5,561 people and Wakulla County 5,811 and no other county was within the stated population limits. Baker County does not touch salt water and, therefore, the Act applied only to Wakulla County. It was introduced into the Legislature at the First Extraordinary Session of 1931 by consent of two-thirds of the members of the House and did not have attached thereto affidavit of notice as required of the local bills under Section 21, Art. III, of the Florida Constitution. The Act therefore in my opinion is clearly unconstitutional under the decisions in the cases of *Dowling v. W. R. Hodges & Son*, 131 Fla. 762, 179 So. 702, and *State v. Stortamire*, 131 Fla. 698, 179 So. 730.

Other laws based upon population limits which in each case affect only one county are as follows: As to mullet only, Levy County (C. 17934), Okaloosa County (C. 17935), Santa Rosa County (C. 17936); as to all salt water fish, Taylor County (C. 19425), Levy County (C. 19427). The 1937 Act affecting Levy County (C. 17934) was held unconstitutional in the *Hodges* case, *supra*, and the others in my opinion are equally invalid for the reasons expressed in that opinion.

A public official ordinarily is bound by the presumption that an Act of the Legislature is constitutional until judicially determined otherwise. However, where the legislative journals show there was no compliance with the con-

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stitutional prerequisites to passage of local Acts, there is no such presumption and the public official may enforce the general law as if such local Act had never been passed. *Dowling v. W. R. Hodges*, *supra*.

The other Act to which reference has been made (C. 17933, Acts of 1937), concerns all counties on the Gulf coast west of the Aucilla River. While there is some question of its constitutionality under the decision of *Lipscomb v. Gialourakis*, 101 Fla. 1130, 133 So. 104, the Act is not so clearly void and would require judicial determination. Therefore this Act must be presumed to be valid and your board is bound by such presumption.

SECTION 9

State Officers — Board of Control

April 22, 1939—O-768.

AUTHORIZED TO ADOPT TRAFFIC REGULATIONS AT
UNIVERSITY OF FLORIDA*Gentlemen:*

You have requested my opinion on the following questions:

"1. Has the Board of Control authority to adopt traffic regulations on all the streets, roads and driveways of the campus of the University of Florida?"

"2. Has the Board of Control authority to collect fines from persons violating reasonable traffic regulations adopted by the board as an aid to enforcing such regulations?"

"3. Has the City of Gainesville authority over all traffic regulations on that part of the campus lying within the limits of the City of Gainesville?"

From information furnished subsequent to your letter, it appears that the entire campus of the University of Florida is located within the corporate limits of the City of Gainesville, and also that the streets on the campus are open to the public, except those around the dormitories reserved for girl students during Summer School, from the hours of 7 P. M. to 7 A. M.

Section 778, Compiled General Laws of Florida, 1927, reads in part as follows:

"The Board of Control shall have jurisdiction over and complete management and control of all the said several institutions and each and every of them, to-wit: The University of Florida * * *, and is hereby invested with full power and authority to make all rules and regulations necessary for their governance not inconsistent with the general rules and regulations made or which may be made at any joint meeting of the said board with the State Board of Education."

I am of the opinion that the above quoted statute authorizes the Board of Control to adopt reasonable traffic regulations on the streets, roads and driveways of the University of Florida campus. However, I am of the opinion that the Board of Control may not provide for the exaction of fines from persons for violating any traffic regulation adopted by the Board of Control. Article V, Section 1, of the Florida Constitution vests all judicial power in certain courts. The imposition of a fine for violation of the general traffic regulations is an exercise of judicial power, which, if attempted to be exercised by the Board of Control, would be contrary to the above mentioned constitutional provision.

I am also of the opinion that the City of Gainesville has the same authority over traffic on the University of Florida campus streets that it has over traffic on the other streets within the corporate limits of Gainesville.

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June 9, 1939—O-376.

RADIO STATION WRUF, UNIVERSITY OF FLORIDA—
SALE AND LEASE*Gentlemen:*

This is in reply to the letter of Mr. Diamond, dated June 8, which reads as follows:

"The Board of Control at a special meeting held this morning directed me to request on behalf of the board your opinion upon the following matters:

"1. Whether the Legislature, by any general appropriation Act, can confer any power upon the Board of Control to sell or lease Radio Station WRUF in view of Section 30, Article III, of the State Constitution which prohibits the inclusion in the General Appropriation Bill of any matters except the appropriation of money.

"2. Whether there is any State statute authorizing the Board of Control to execute a long-term lease of the radio station.

"3. Whether the Federal Communications Commission has the power to withhold its consent to the leasing or assignment of the radio station, and the effect of its so doing.

"The board has asked that you let it have your opinion on these matters at the very earliest possible moment, and that you transmit a copy of your opinion to the Governor."

1. Article III, Section 30, of the Florida Constitution, reads as follows:

"Laws making appropriations for the salaries of public officers and other current expenses of the State, shall contain provisions on no other subject."

While the language of this section appears clear, a specific answer to your inquiry is not possible, inasmuch as it is not the function of this office to express official opinions regarding the constitutionality of statutes which have been enacted or are pending.

2. Other than the provisions contained in the 1937 and 1939 General Appropriations Bills, I find no statute which specifically mentions a leasing of the radio station. However, I call your attention to Section 2 of Chapter 12217, Acts of 1927, which reads as follows:

"That said sum or as much thereof as may be necessary shall be expended by and under the direction of the Board of Control, who shall have power to enter into a contract or contracts for the design, erection, installation, operation and maintenance of said broadcasting station."

A direct answer to your second question is not possible, as the phrase "long-term lease" is not sufficiently definite. However, I am not prepared to say that a lease could not be drawn which would come within the scope of the power conferred upon the Board of Control by the language used in the statute above mentioned.

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3. The United States Government maintains control over radio transmission through the Communications Commission, and provides for the use of radio communication by persons for limited periods of time, under licenses granted by the Commission. Title 47, Section 310, U. S. Code Anno., reads in part as follows:

"(b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing."

In view of the above language, it seems clear that the Federal Communications Commission has power to withhold its consent to the lease or assignment of a license to operate a radio station. The effect of the withholding of such consent would doubtless result in the lessee or assignee being refused a license to operate the station.

June 19, 1939—O-380.

RADIO STATION WRUF—RIGHT TO USE ADVERTISING FUND
TO DEFRAY OPERATION COSTS UNTIL SAME IS LEASED
OR OTHERWISE DISPOSED OF

Dear Sir:

This will acknowledge receipt of your letter of June 19.

In regard to Radio Station WRUF, you state that the board is endeavoring to make arrangement for a lease or a management contract for this station so that it may be operated without cost to the State and that it is impossible to perfect such an arrangement and have same approved by the Federal Communications Commission before June 30 when the appropriation for the operation of this station terminates. You also state that its license to operate and its wave length may be cancelled by the Federal Communications Commission if the station closes down.

You state further that the board has on hand collected for advertising done by the station and now on deposit in the State Treasury under the designation "Radio Station Incidental Fund," the sum of \$8,188.94, which the board desires to use or so much as is necessary, to keep the station in operation until it can be leased or operated under a management contract. You propound the following question:

If in my opinion under the laws of Florida and the existing circumstances, does the board have authority to use said money for the purpose of keeping the radio station in operation pending the approval by the Federal Communications Commission of a lease or management contract?

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In reply I wish to advise that this question arises only by reason of the fact that the Governor vetoed certain items in the 1939 Appropriation Act which left the station without money to operate unless it could do so from other sources.

It is interesting to note that under date of October 15, 1927, the then Attorney General held that under Chapter 10241, Acts of 1925, your board was under a mandatory duty to construct this radio station. See the Biennial Report of the Attorney General, 1927-1928, page 240.

On September 6, 1928, this office further held:

"The Legislature, in passing the law, is presumed to have passed the same in the light of usual customs and practices incident to the operation of radio stations generally, which usual customs and practices were known to the Legislature to involve a limited use of the station for advertising purposes and realization of fees therefrom, which are used to defray the expenses of operation. In this way a station is made to a certain extent to pay its own way." See Biennial Report of the Attorney General, 1927-1928, page 243.

We, therefore, see that the Board of Control was under a mandatory duty to erect this station and that it could thereafter use the station for advertising purposes and collect fees therefor and use the same to defray the expenses of the station.

I find that substantially this provision has been in our appropriation Acts for many years:

"All moneys received by the institutions under the management of the State Board of Control * * * other than from State or Federal sources are hereby appropriated to the use of the State Board of Control * * * for the respective institutions collecting same, *to be expended as said board may direct* and said moneys shall not be deducted from the sums otherwise appropriated by this Act to said institutions."

So we see that the Legislature has recognized the fact that the Board of Control might collect fees from some of the Institutions under its control and to use those moneys in its discretion for the benefit of those Institutions, and without this specific appropriation, of course, under the Constitution the money that has been paid in that you refer to in your letter could not be paid out.

The provision that I have above quoted appears in the 1937 Appropriation Act as Section 2 of Chapter 17707. It also appears in the 1939 Appropriation Act.

I, therefore, am of the opinion that since the Board of Control was under a mandatory duty to erect this radio station and had authority to charge fees therefor, the Governor's veto of the specific sums appropriated by the 1939 session of the Legislature did not have the effect of repealing the authority of the Board of Control to continue to maintain this radio station, but that it could not operate such station at any expense whatsoever to the State of

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Florida, and that since the Board of Control has on hand the sum of \$8,183.94 to the credit of said station and since said money was derived from advertising done by the station, under the section of the 1937 and the 1939 Appropriation Act, said money is now available for the purpose of keeping the radio station in operation if the board so desires to do.

I, therefore, answer your question in the affirmative.

August 28, 1940—O-906.

**PROPOSED ASSIGNMENT OF CERTAIN MUSICAL
COMPOSITIONS**

Dear Sir:

This will acknowledge receipt of your letter of August 19 enclosing a short form of assignment that the Thornton W. Allen Company requested from the Board of Control in connection with its contract for the printing of certain University songs. You request me to advise you as to the legality and advisability of executing this assignment.

In reply I wish to say that this assignment or one very similar was submitted to me at the time the original contract was before me for approval as to form. At that time I did not approve this assignment for the reason that it did not contain the entire agreement of the parties, it being an outright assignment which would have vested in the Thornton W. Allen Company the absolute title in and to the songs mentioned. You will note that the original agreement in the first paragraph thereof, makes an assignment of the musical compositions therein mentioned.

I therefore do not know of any reason why I should change my position in the matter and I cannot advise the Board of Control to execute the assignment as submitted.

September 19, 1940—O-940.

**FLORIDA STATE COLLEGE FOR WOMEN—NON-RESIDENT
TUITION FEES**

Dear Sir:

Your letter of September 18 is at hand. In it you request my opinion as to whether or not the Florida State College for Women is authorized to admit one Miss Miriam Joy Solomon without the payment of non-resident tuition fees as fixed by the Board of Control and the State Board of Education.

The facts may be stated succinctly thusly: Miss Solomon is under twenty-one years of age. Her parents reside in the State of New York, her father being a legal resident of that sovereign. The child has resided for the greater part of her life with her grandmother in the City of Miami in the State of Florida. The grandmother has never been appointed guardian

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by deed of writing by the child's parents. Miss Solomon attended high school in Miami and attended college outside of the State for two years.

Upon this statement of facts, it is my opinion that Miss Solomon is not entitled to attend the Florida State College for Women without paying the non-resident tuition fees.

Section 768 of the Compiled General Laws of 1927 provides, in part, that:

"In the case of the admission of students to either the said university or college from other States, the same may be admitted by and with the consent and upon the certificate of the Board of Control upon such terms as to tuition, board, etc., as the Board may from time to time establish.

"The several departments of the said college and the said university shall be open to applicants for admission *who are citizens of this State* at the lowest rate and expense consistent with the welfare and efficiency of the respective institutions * * *."

This section of the statutes very definitely establishes two classifications of students—citizens of Florida and non-residents.

The term "citizen" is distinguished from "resident" or "inhabitant." *Harris v. Harris*, 205 Iowa 108, 215 N. W. 661; *Travis v. Yale & Towne Mfg. Co.*, 40 S. Ct. 228, 252 U. S. 60, 64 L. Ed. 460. The words "citizen" and "citizenship" usually include the idea of domicile. *U. S. v. Cronich* (D. C.), 211 Fed. 548; *Delaware, L. & W. R. Co. v. Petrowsky* (C. C. A.), 250 Fed. 554. In the case of *Herron v. Passailaigue*, 92 Fla. 818, 110 Southern 539, it has been stated that "legal residence" means place of domicile or permanent abode, as distinguished from temporary residence.

Miss Solomon is not domiciled in Florida. Her domicile, during her infancy, is that of her father. *Beekman v. Beekman*, 53 Fla. 858, 43 Southern 923. Mrs. Goldstein, the grandmother of Miss Solomon, is not her guardian. Section 5884 provides the method whereby Mrs. Goldstein could have been appointed Miss Solomon's guardian; and this has not been done. The right of parents to appoint guardians for their children is of statutory origin (*McGriff v. Leonard*, 83 Fla. 695, 93 Southern 179), and the statutes must be complied with before there has been any legal appointment of a guardian.

It is my opinion, therefore, that Miss Solomon is not such a *citizen of this State* as to entitle her to admission to the Florida State College for Women without paying the non-resident tuition fees. In arriving at this conclusion, I am not unmindful of the fact that Florida has a large percentage of tourist or transient population. The policy of the public school officials of this State in the past has been to receive free of charge in our public schools the children of non-resident and non-domiciled parents. However, in those cases, there is no statutory requirement that the pupils be citizens of the State of Florida.

In a former opinion rendered by this office, it was held that a pupil whose parents or guardian own a car carrying a license plate of a State other than

STATE OFFICERS — Board of Control

Florida should be admitted to the public schools in this State. That opinion contained this language:

"It is my opinion that the question should be answered in the negative, *there being no statutes denying admittance* to the public school of Florida under the circumstances above stated." (Opinion dated Jan. 19, 1938.)

In the instant case, however, the statute quoted specifically provides that applicants entitled to admission without charge for tuition shall be citizens of this State. Thus, in view of this section of our statute and the authority previously cited in this opinion, it is clear that persons domiciled outside of Florida are not entitled to the benefits of our Institutions of higher learning without charge.

SECTION 10

State Officers—Board of Education

February 18, 1939—O-53.

CITY OF PALMETTO REFUNDING PLAN AUTHORIZED

Gentlemen:

This is in reply to your letter of January 25 in which you advise that the State Board of Education, at its meeting held on January 24, 1939, officially agreed to enter into the refunding plan of the City of Palmetto subject to the approval of the Attorney General.

Briefly stated, that refunding plan consists of entering into an agreement to accept certain refunding bonds in exchange for bonds now held in the State School Fund and to become a party to the proceeding in bankruptcy now pending in the United States District Court for the Southern District of Florida by filing a claim therein. The plan is set forth in a printed pamphlet issued by the fiscal agents for the City of Palmetto. The following provision contained in said pamphlet is especially important:

"EIGHT. The refunding bonds will not be delivered by the City and the holders of the indebtedness to be refunded thereby will not be obligated to accept the same or surrender their present claims until the refunding bonds shall be approved by Messrs. Thomson, Wood & Hoffman, attorneys of New York City, as to validity and enforceability and the validity of the refunding bonds and the covenants and agreements contained herein shall be duly adjudicated and sustained by a court of competent jurisdiction in a validation proceeding instituted by the City for that purpose and unless the holders of not less than 66 2/3% of the principal amount of outstanding bonds accept the readjustment and refunding proposed hereby."

It is my opinion that the State Board of Education has the legal authority to enter into the proposed refunding plan.

May 2, 1939—O-167.

COLLECTION OF INTEREST COUPONS ON
PASCO COUNTY BONDS*Dear Sir:*

This is in reply to your letter of April 21, 1939, requesting the Attorney General to take the necessary steps to collect the 5% interest coupons on the \$107,000.00 of Pasco County, Florida, road and bridge refunding bonds dated October 1, 1932, deposited for exchange of a like amount of refunding bonds dated April 1, 1938.

The aforementioned bonds were transmitted to the First National Bank of Chicago, pursuant to a letter of transmittal specifying that the bonds

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should be held, uncanceled, until 75 per cent of the refunding bonds have been actually exchanged, and providing that prior to such time, they could be recalled by the sender.

One method of collecting 5% coupons would be for the Board of Education to instruct the State Treasurer to recall the bonds deposited for exchange under the aforementioned letter of transmittal. After the bonds are returned, the coupons could be clipped and sent to the paying agent bank for collection in the regular manner.

As an alternative method, the Board of Education might instruct the State Treasurer to clip the 4% coupons from the bonds now in the possession of the State Treasurer, and send them to the First National Bank of Chicago, with instructions for the bank to clip the corresponding coupons from the 5% bonds and send them to the paying agent bank in New York City, with instructions to such bank to pay same and remit the proceeds to the State Treasurer.

July 26, 1939—O-362.

SCHOOL LANDS—LIABILITY FOR DRAINAGE TAXES OF
SOUTH FLORIDA CONSERVANCY DISTRICT

Dear Sir:

I have your letter of the 20th ultimo relative to the payment of drainage taxes of South Florida Conservancy District on the lands of the Everglades Experiment Station. You make two suggestions: First, that the taxes might be paid from the General Appropriation Act for said Experiment Station, and second, by the trustees of the Internal Improvement Fund in view of the provisions of Section 3, Chapter 8442, Laws of Florida, Acts of 1921. The lands in question are owned and held by the State Board of Education.

In my opinion the Legislature in making a general appropriation for said Experiment Station, did not contemplate that the same or any part of the same be used for the payment of taxes, and I do not think that the payment of these taxes from such fund would be authorized.

Section 3, Chapter 8442, Laws of Florida, Acts of 1921, to which you refer, reads as follows:

"The Trustees of the Internal Improvement Fund are hereby authorized and directed to set aside and withdraw from sale, any lands now or hereafter owned by the State, necessary for the use and conduct of the said Agricultural Experiment Station, and to provide and construct all canals, drains and other reclamation works that may be required to completely protect and secure the said lands from overflow. The said lands shall be as suitably and conveniently located as possible and shall not be less than 160 acres, which may be added to as the needs demand."

In my opinion the language of the above quoted section does not authorize

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the trustees of the Internal Improvement Fund to assume and pay the said taxes on said lands owned by the State Board of Education. Neither do I know of any other law that would authorize the Trustees I. I. Fund to make such payment. The funds of the trustees of the Internal Improvement Fund are trust funds and may not be used for purposes other than specifically provided by law.

SECTION 11

State Officers — Board of Examiners in Basic Science

November 1, 1939—O-644.

BASIC SCIENCE LAW—HEALING ART CERTIFICATE OF
PROFICIENCY—CITIZENSHIP PREREQUISITE*Dear Sir:*

Replying to your letter of October 30, 1939, I call your attention to Section 12 of Chapter 19281, Laws of Florida, Acts of 1939, which provides:

"No person shall be eligible for examination for a certificate of proficiency in the basic sciences until he shall have furnished satisfactory evidence to the Board that he is a citizen of the United States, * * *."

The furnishing of satisfactory evidence to the board that an applicant is a citizen of the United States of America is a prerequisite to the right of such applicant to be examined for a certificate of proficiency.

November 2, 1939—O-645.

BASIC SCIENCES LAW—HEALING ART—CERTIFICATE OF PRO-
FICIENCY UNDER CHAPTER 19281, ACTS OF 1939*Gentlemen:*

You request my opinion concerning the scope of the healing art as defined in Chapter 19281, Laws of Florida, Acts of 1939, known as the Basic Sciences Law. Numerous questions concerning the applicability of the Basic Sciences Law will be propounded by individuals seeking to determine whether they must obtain certificates of proficiency under that law, in order to qualify to practice their particular professions.

As stated in your letter, your board is not a licensing board, but is merely an examining board to pass on the proficiency of candidates in the basic sciences. It is not, therefore, your duty to say who shall or who shall not be required to take your examinations. It is rather the duty of particular licensing boards in various branches of the healing art to require a certificate of proficiency from your board, before issuing professional licenses. For that reason, I am limiting this opinion to a statement of the fundamental principles involved in the determination of whether a particular person should or should not take the examinations of your board. I am not, at this time, compiling lists of those professions which require and those which do not require applicants for professional licenses to have first obtained certificates of proficiency from your board. This is a matter which can more appropriately be determined at the time application is made, in any particular instance, to a licensing board for a professional license.

In the case of an individual who entertains a doubt as to the necessity for

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him to take the examinations of your board, it would be my suggestion that he first determine whether the business or profession in which he seeks to engage, is a branch of the "healing art," as defined in Section 2 (b) of Chapter 19281, which reads as follows:

"(b) For the purpose of this Act, the healing art includes any system, treatment, operation, diagnosis, prescription or practice for the ascertainment, cure, relief, palliation, adjustment, or correction of any human disease, ailment, deformity, injury, or unhealthy or abnormal physical or mental condition."

The words "healing art" have been judicially defined as follows:

"'Healing art' falls under police powers of State. 63 P. S. Pa., Sec. 401; U. S. C. A. Const. Amend. 14. The 'healing art' which is the art of relieving and curing human ills, is a generic expression and ordinarily embraces the whole art of healing and its many theories and practices. *Steinbach v. Metzger*, C. C. A. Pa., 63 F. 2d 74, 75." Words and Phrases, 5th Series, Volume 3, page 152.

If such business or profession does not come within the general scope of the statutory definition above set forth, then no certificate of proficiency from your board is required. If, however, such business or profession does come within the statutory definition, then it is necessary for the individual to consider whether he is exempt from the provisions of the Basic Sciences Law. These exemptions are set forth in Section 5 of the Act, which reads as follows:

"Section 5. This Act shall not be construed as applying to dentists, pharmacists, nurses, optometrists, chiropodists and Christian Scientists practicing within the limits of their respective callings; nor to persons licensed to practice the healing art of any branch thereof in the State of Florida at the time this Act first takes effect, nor to persons specifically permitted by law to practice without licenses who practice each within the limits of the privileges thus granted them."

If, therefore, one desires to engage in, or continue engaging in, a business or profession within the definition of the words "healing art" he must take the examination of your board, unless:

1. He is a dentist, pharmacist, nurse, optometrist, chiropodist, or Christian Scientist practitioner; or unless,
2. He has been licensed to practice such branch of the healing art in the State of Florida at the time the Basic Sciences Law became effective, to-wit, ninety days after June 12, 1939; or unless,
3. He can point to a specific law or a court decision authorizing persons to practice such branch of the healing art without license.

You request my further opinion as to whether physio-therapy, diathermy and short-wave therapy, Swedish massage and vapor baths are branches of the healing art as defined in the Basic Sciences Law. It would be my opinion that the first two named by you would be branches of the healing art, but that the third would not.

SECTION 12

State Officers—Board of Examiners of Nurses

June 12, 1940—O-822.

NURSES—REVOCATION OF CERTIFICATE

Dear Madam:

This is in reply to your letter of June 4. You state that a nurse, registered by the Florida State Board of Examiners of Nurses, has been convicted in the State of Connecticut of addiction to the use of drugs. You inquire whether the Florida State Board of Examiners of Nurses has authority to revoke the certificate of said nurse upon receipt of a letter from the Secretary of the Board of Examiners of Nurses of the State of Connecticut.

Under the provisions of Section 2209, Revised General Statutes (Section 3504, Compiled General Laws) your State board may revoke any certificate "for sufficient cause" but the holder of such certificate "shall have thirty days' notice," and a full and fair hearing of charges made against her. Revocation may be ordered only upon a majority vote of the whole board. While the statutes relating to revocation of certificates do not set forth specific grounds for such revocation, it would appear that specific grounds are set forth which would authorize the board to refuse to issue or renew a certificate of registration. See Section 10 of Chapter 7831, Laws of Florida, Acts of 1919 (Section 3517, Compiled General Laws). It seems to me to be clear that a certificate could be revoked by your board on any ground upon which your board would be authorized to refuse to issue or renew a certificate. It would therefore appear that addiction to the drug habit would be a ground for revocation of a certificate of registration.

A certificate cannot be revoked, however, upon mere receipt of a letter from an officer of another State. Charges must be made against the nurse and she should be furnished with a copy of same and be given the right, after thirty days' written notice, to a full hearing before the board. The only proper evidence of her conviction by the Connecticut court would be an exemplified transcript of the judgment of conviction.

SECTION 13

State Officers — Board of Forestry

July 6, 1940—O-862.

COOPERATION WITH DUVAL COUNTY UNDER CHAPTER 17024

Dear Sir:

One of the enclosures submitted with your letter of July 1 was a copy of a communication to you from Mr. Elliot W. Butts, Clerk of Board of County Commissioners of Duval County. In this communication, notice is given to you as State Forester discontinuing cooperative efforts with Duval County for protection of the forests of said county from fire. This communication states that Duval County has made no appropriation for this purpose for the fiscal year 1940-1941. You state that there has never been any formal agreement entered into between Duval County and the Florida Board of Forestry in accordance with Chapter 17024, Laws of Florida, Acts of 1935.

There is nothing in the communication to you from the Clerk of the Board of County Commissioners of Duval County which would render the county ineligible to come within the provisions of Chapter 17024. It is my opinion, however, that further cooperative agreements with this county should be entered into in compliance with the provisions of that Act.

September 23, 1940—O-942.

FOREST AND PARK SERVICE—CHILD LABOR—PRODUCTION
PINE SEEDLINGS IS AGRICULTURAL LABOR*Dear Sir:*

This is in reply to your letter of September 18, 1940, in which you state that at your nursery at Olustee you employ labor in the growth, packing and bundling of pine seedlings which are grown there.

You ask to be advised as to whether or not the production of these seedlings is an agricultural pursuit. You also ask to be advised as to the minimum age limit for employees engaged in this work as provided by the child labor statutes of Florida.

I am of the opinion that the work you specify constitutes agricultural employment. See *Hill v. Georgia Casualty Company*, 45 S. W. (2d) 566. I am further of the opinion that there is no minimum age requirement under the child labor statutes of this State, for the reason that Compiled General Laws of Florida, 1927, Section 5962, specifically exempts application of those statutes to children engaged in agricultural employment.

STATE OFFICERS — Board of Forestry

September 24, 1940—O-937.

**FOREST AND PARK SERVICE—DETERMINATION OF MILLAGE
RATE BY COUNTY COMMISSIONERS***Dear Sir:*

You call my attention to Chapter 17024, Laws of Florida, Acts of 1935, which is the County Fire Control Law, enacted by the Legislature. This statute authorizes the various counties to levy taxes for the purpose of co-operating with the Florida Forest and Park Service in county fire control projects.

You propound several questions with regard to limitations on the authority of boards of county commissioners to levy the taxes pursuant to Chapter 17024. As to one of the questions propounded, you are obtaining further information to submit for my consideration. The other question deals with the statutory basis for fixing the rate of millage to be assessed by boards of county commissioners to produce the amounts sufficient to meet the requirements of the county budgets.

The authority of boards of county commissioners with regard to fixing the rate of taxation is contained in Section 731, Revised General Statutes, 1920 (Section 937, Compiled General Laws, 1927). This section of the law does not specify what percentage of the taxes levied can be anticipated by the boards of county commissioners. The only statutory provisions relating to the authority of boards of county commissioners to anticipate the percentage of taxes to be collected, seems to be contained in Section 1525, Revised General Statutes, 1920 (Section 2303, Compiled General Laws, 1927). This section makes it unlawful for boards of county commissioners to expend or contract for the expenditure of more than 95 per cent of the anticipated revenue of the county in any one fiscal year, both from taxes and other sources.

I invite your attention to the provisions of law hereinabove specifically mentioned.

SECTION 14

State Officers—Board of Funeral Directors

August 24, 1939—O-550.

WHEN BOARD AUTHORIZED TO ISSUE LICENSE

Gentlemen:

You request my opinion concerning substantially the following state of facts:

Pursuant to Chapter 17032, Laws of Florida, Acts of 1935, the State Board of Funeral Directors and Embalmers, created by that Act, issued to one Charles Brown a funeral director's license. This license was issued without examination by reason of the provisions of the above statute authorizing the issuance of licenses, without examination, to those persons actively engaged in the profession or business of funeral directing at the time of the passage of such statute. In the 1937 session of the Florida Legislature, Chapter 17950 was enacted, which created the present State Board of Funeral Directors and Embalmers and provided for the licensing of funeral directors and embalmers. Chapter 17950 has superseded Chapter 17032, Acts of 1935. In March of 1939, Charles Brown died. Your board advised Minnie Brown, his widow, that in order to operate the funeral home, she must employ a Florida licensed funeral director. Minnie Brown has now applied for a funeral director's license, without examination.

Sections 7 and 8 of Chapter 17950, Acts of 1937, relate to the licensing of funeral directors and embalmers. The only provision in Chapter 17950 for the licensing of persons without an examination as therein required, is that which states that any person who, at the time of the passage of said Act, was a licensed funeral director or embalmer under the laws of Florida, shall be considered as duly licensed under the terms of Chapter 17950. In Section 18 of Chapter 17950, the Legislature has declared it to be unlawful for any person to engage in the profession of funeral director or embalming without a license as provided in said statute.

Your board has no authority to issue licenses under any conditions other than the ones specified in Chapter 17950, Acts of 1937. You would have no authority to issue a license to Minnie Brown, unless and until she complies with the provisions of said statute.

STATE OFFICERS — Board of Funeral Directors

December 4, 1940—O-1003.

**BOARD NOT AUTHORIZED TO CREDIT APPRENTICE EMBALMER
FOR TIME SPENT IN MILITARY SERVICE WHEN NOT
PERFORMING SERVICES CONNECTED
WITH EMBALMING***Gentlemen:*

Section 8 (1) of Chapter 17950, Laws of Florida, Acts of 1937, prescribes the qualifications to be met by persons seeking to be examined by the State board for licenses as embalmers. One of these qualifications is that such a person shall have had three years of practical training and instruction as an apprentice under a regular licensed and practicing embalmer holding a Florida State license.

You request my opinion with regard to the authority of the State board to promulgate a regulation for the benefit of apprentices whose apprenticeship is interrupted for services in the military service of the United States. In other words, such a proposed regulation would permit an apprentice to receive credit on his required three years of apprenticeship for the time of service with the military service of the United States, regardless of whether he continues to engage in embalming in such military service.

It is my opinion that Section 8 (1) requires three years of *training* in the field of embalming. It would therefore follow that time not devoted to such training cannot be considered in determining whether an applicant for examination as an embalmer has had the required three years training as an apprentice. The board could not therefore promulgate such a regulation.

The interruption of the apprenticeship of an apprentice embalmer should not, of course, wipe out the credit for actual training he has received. If for instance an apprentice embalmer has served as an apprentice for two years, then joins the military service of the United States for a year, he should at the end of his military service, be permitted to resume his apprenticeship, and at the end of another year, provided he has met other requirements, he should be permitted to take the examination.

SECTION 15

State Officers — Board of Health

January 31, 1939—O-687-1.

BUREAU OF VITAL STATISTICS—LOCAL REGISTRAR NOT
STATE OFFICER—MAY ACCEPT FEES*Dear Sir:*

This is in reply to your letter of January 24 in which you request my opinion as to whether a local registrar who is also a conservation officer with the Department of Game and Fresh Water Fish may legally accept fees as such local Registrar of Vital Statistics.

It is my opinion that his appointment as local Registrar of Vital Statistics under Section 2071, Revised General Statutes, Section 3271 Compiled General Laws, does not constitute him a State officer within the purview of Article XVI, Section 15, of the Florida Constitution and that he may accept the statutory fees due him.

May 20, 1939—O-290.

UNITED STATES PUBLIC HEALTH SERVICE MILK ORDINANCE
—MUNICIPALITIES MAY ADOPT BY REFERENCE*Dear Sir:*

In reply to your letter of the 19th, inquiring as to whether or not the municipalities of this State may adopt the United States Public Health Service Milk Ordinance by reference only in order to save the cost of printing, I would state that if the copy of this ordinance which you have sent me is a law of the Federal Government, then the same may be adopted by reference; however, if it is not a law, then the same could not be adopted by reference by municipalities but would have to be printed in full. In this connection see *Wright v. Worth*, 91 So. 87.

In answer to your second question, if there is nothing in this ordinance that conflicts with the State law and the charters of the respective municipalities give them the right to regulate the quality of milk used in hospitals, schools and other private institutions within the jurisdiction of the municipalities, I see no reason why this ordinance should not apply to such institutions.

STATE OFFICERS — Board of Health

June 21, 1939—O-386.

**BURAU OF VITAL STATISTICS—ISSUANCE OF NEW BIRTH
CERTIFICATE OF ADOPTED PERSON***Dear Sir:*

You enclose with your letter of June 20 a copy of the form of certificate of birth of adopted person prescribed by the State Board of Health, pursuant to the provisions of Senate Bill No. 72, Acts of 1939. You refer particularly to a situation with which you are confronted, and request my opinion as to whether the Bureau of Vital Statistics can issue a new certificate of birth; if so, you further inquire as to the proper form of certificate.

You state that two women have adopted a child. I assume that you have a certified copy of the judgment or decree authorizing the adoption. I also assume that application has been made for the issuance of the new certificate of birth, pursuant to said Senate Bill No. 72, Chapter 19063.

You would be authorized to assume the validity of the judgment or decree of adoption. Your duties would not extend beyond those set forth in said Senate Bill No. 72, the pertinent provisions of which are as follows:

"That whenever the State Registrar of Vital Statistics shall have received and filed proofs establishing to his satisfaction * * * that a court of competent jurisdiction has entered a judgment or decree authorizing and providing for the adoption of a person whose birth has been previously registered, then, in such case, and every such case, the State Registrar of Vital Statistics may enter upon an appropriate record of said Bureau the facts so found by him, and make and file a new certificate of birth upon the application of any interested person and the submission to him of a certified copy of such judgment or decree issued by a court of competent jurisdiction. Such new certificate of birth shall be in such form as shall be prescribed by the State Board of Health of the State of Florida, and shall be prepared upon the basis of the status of such person, subsequently acquired or established as shown by the records of said Bureau as amended or supplemented as aforesaid; provided, however, that in every case of adoption, the parents named in such new certificate of birth, shall be affirmatively shown to be adoptive parents."

It would be my suggestion that you amend your form of certificate of birth to fit the circumstances of the case. You could substitute for the words "adoptive father of child" the words "adoptive joint mother of child" and you could have the certificate sworn to by both adoptive parents.

STATE OFFICERS — Board of Health

September 28, 1939—O-578.

**BUREAU OF VITAL STATISTICS—PAYMENT OF ADDITIONAL
COMPENSATION BY SOCIAL SECURITY BOARD TO
DIRECTOR, BUREAU OF VITAL STATISTICS,
REGISTRARS AND CLERKS***Dear Sir:*

This is in reply to your letter of September 25, which reads in part as follows:

"I have this morning returned from a conference with the Social Security Board in Washington where I discussed a plan for proposed cooperation of the Bureau of Vital Statistics with the Social Security Board in obtaining prompt proof of death of beneficiaries under the Social Security Act. The plan proposed by the Social Security Board is that they will pay a stated fee to each registrar for proof of death in those cases where the death certificate shows a Social Security number; that the Board also proposes to pay an amount yet to be determined to the Central Bureau of Vital Statistics for the additional clerical labor necessary to carry out the proposed plan and a small additional stipend to the Director of the Bureau of Vital Statistics for his supervision of such plans.

"The Board desires to make these payments to a person to be designated by said Board in a lump sum, the person so designated then being responsible for the proper distribution of the funds so contributed. I desire your opinion as to whether the laws of Florida will permit the appointment of such a person for the purposes stated with the authority in the person so appointed to distribute the funds as proposed."

I know of nothing in the laws of Florida which would forbid a person from entering into an agreement with the Social Security Board whereby he would receive certain funds and disburse them pursuant to the provisions of such agreement. If the person entering into such an agreement happened to be a State official, the agreement with the Social Security Board would have to be in his individual capacity and the State of Florida would not be responsible in case he failed to carry out his agreement with the Social Security Board. There is no constitutional or statutory objection to the Director of the Bureau of Vital Statistics receiving additional compensation out of Federal funds. See opinion of my predecessor dated March 28, 1938, entitled "Officers—Extra Compensation from Federal Funds." By the same token, there would be no objection to compensation being paid by the Social Security Board for additional clerical labor in the central Bureau of Vital Statistics, and to the Vital Statistics registrars throughout the State.

STATE OFFICERS — Board of Health

October 31, 1939—O-639.

STATE BOARD OF HEALTH—DIVISION OF DRUG INSPECTION—
NOT AUTHORIZED TO MAKE ARRESTS OR SEARCHES OF
NARCOTIC ADDICTS UNDER DRIVERS' LICENSE LAW*Dear Sir:*

This is in reply to your letter of September 14, in which you state the following:

"With reference to the State Drivers License which goes into effect on October 1, 1939, and the section dealing with narcotic addicts, I presume there is no other bureau of the State that is in a position to know the narcotic addicts and peddlers as officers of this bureau stationed in Jacksonville, Miami, Tampa and Lake City; therefore, I would like to know if officers of this bureau would be authorized to stop and examine known narcotic addicts and peddlers license upon the highways of Florida."

Subsection 4 of Section 17 of Chapter 1955, Laws of Florida, Acts of 1939, known as the Florida Drivers License Law reads as follows:

"The Department shall not issue any license hereunder: * * *

"4. To any person, as an operator or chauffeur, who is an habitual drunkard, or *is addicted to the use of narcotic drugs.* (Italics ours.)

I also call your attention to the following contained in Section 5 of the Florida Drivers License Law:

"Nothing herein contained in this section shall be construed in any wise as a limitation upon the existing powers and duties of sheriffs, police officers or other law enforcement officers. Except as specifically authorized herein, said Patrol Officers shall not otherwise perform the duties and functions of sheriffs, constables and other law enforcement officers."

The following is from Section 20 of Chapter 16087, Laws of Florida, Acts of 1933, as amended by Section 3 of Chapter 17129, Acts of 1935:

"* * * All officers, agents, inspectors, and representatives of the State Board of Health engaged in the enforcement of the provisions of this Act, shall in addition to their respective positions be designated as 'STATE POLICE' and shall have the same authority as a deputy sheriff, to bear arms concealed or otherwise, and to make searches, seizures, and to arrest with or without warrants for any violation of the provisions of this Act, and/or any other laws of the State of Florida; provided, however, that such officers, agents, inspectors, and representatives, shall first furnish a bond of not less than \$1,000.00 approved by the State Board of Health, and made payable to the Governor of this State."

The police powers conferred on officers of the Narcotic Bureau must be construed as limited by the words appearing in the statute, "engaged in the enforcement of the provisions of this Act." Such officers would have no

STATE OFFICERS — Board of Health

authority to make arrests or searches for violations of the Florida Drivers License Law. They should, however, make available to the Department of Public Safety such information as will enable the department to cancel the licenses of such addicts, pursuant to Section 34 of the Drivers License Law.

December 29, 1939—O-687.

DIRECTOR OF BUREAU OF VITAL STATISTICS NOT AUTHORIZED TO INSTRUCT LOCAL REGISTRARS TO REFUSE TO ACCEPT CERTIFICATES FROM OR ISSUE BURIAL PERMITS TO UNLICENSED FUNERAL DIRECTOR

Dear Sir:

I acknowledge receipt of your request for an opinion as to your right to instruct local registrars to refuse to accept certificates from or issue burial permits to a funeral director to whom the State Board of Funeral Directors and Embalmers has declined to issue a license.

Section 3273 of the Compiled General Laws of Florida, 1927, which was originally enacted as Section 3 of Chapter 6892, Laws of Florida, Acts of 1915, provides that the body of persons who died in this State or who shall be found dead herein, shall not be interred, deposited in a vault or tomb, cremated, or otherwise disposed of or removed from or into any registration district, etc., unless a permit for burial or removal or other disposition thereof shall have been properly issued by the local registrar of the registration district in which the death occurred or the body was found.

Section 3278, Compiled General Laws, which was Section 9 of Chapter 6892, makes it the duty of the undertaker or person acting as undertaker to file the certificate of death with the local registrar of the district in which the death occurred, and to obtain a burial, removal, or other permit prior to any disposition of the body.

Section 7 of Chapter 17950, Laws of Florida, Acts of 1937, provides that any person wishing to obtain the right to practice funeral directing or embalming in this State, who has not heretofore been licensed to do so, shall before it is lawful for him to practice funeral directing or embalming, make application to and obtain a license from the State Board of Funeral Directors and Embalmers for the State of Florida created by said Act.

By Section 8 of Chapter 17950, it is required that all persons receiving licenses thereunder, shall register that fact at the office of the clerk of the circuit court and at the office of the local registrar of vital statistics in the jurisdiction in which he proposes to carry on such practice.

By Section 15 it is made unlawful for any person to engage in the profession of funeral directing or embalming, or practice the same or profess to practice the same, or to hold himself out to the public as a funeral director or embalmer, without having a license as therein provided or a renewal thereof,

STATE OFFICERS — Board of Health

the penalty for same being found in Section 23 of the Act, wherein it is also made the duty of the State Board of Funeral Directors and Embalmers by all lawful means to aid in the prosecution of violations of the Act.

At the time of the enactment of Chapter 6892, Acts of 1915, undertakers, as the term was therein used, were not required to have a license such as the license now required by Chapter 17950. There is nothing in either of the Acts herein referred to, requiring the local registrars to refuse to accept certificates from or refuse to issue burial permits to an undertaker or a funeral director who has not been licensed by the State Board of Funeral Directors and Embalmers.

It is therefore my opinion that you have neither the duty nor authority to instruct local registrars to refuse to accept certificates from or issue burial permits to funeral directors, to whom the State Board of Funeral Directors and Embalmers has declined to issue licenses.

January 29, 1940.—O-712.

NARCOTICS—CHIROPRACTIC PHYSICIANS NOT AUTHORIZED TO PRESCRIBE, DISPENSE, AND POSSESS

Dear Sir:

I have your letter of the 22nd instant making inquiry as to whether chiropractic physicians are authorized under the law to prescribe, dispense and possess narcotic drugs.

In reply your attention is called to Section 3397 (3), Compiled General Laws of Florida, Supplement, which reads as follows:

"It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this law."

Your attention is also called to Section 3397 (8), of the same compilation, which provides that a physician or a dentist in good faith and in the course of his professional practice only may prescribe, administer, dispense, mix or otherwise prepare narcotic drugs. It also provides that a veterinarian may do the same but not for use by a human being.

Your attention is next called to Section 3397 (2), of the same compilation, defining the word "physician" as follows:

"'Physician' means a person authorized by law to practice medicine in this State and any other person authorized by law to treat sick and injured human beings in this State and to use, mix or othrewise prepare narcotic drugs in connection with such treatment."

Your attention is further called to the chiropractic statutes and particularly Section 3346, Compiled General Laws of Florida, Supplement (1938 Pocket Part), which specifically provides that a chiropractor "shall not pre-

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scribe or administer to any person any medicine or drug included in materia medica."

In view of the above and the fact that I have not been able to find any later statutes on the subject of your inquiry, it is my opinion that a chiropractor is not authorized under the law to prescribe or dispense narcotic drugs or to possess them for prescribing or dispensing.

March 25, 1940—O-767.

BUREAU OF VITAL STATISTICS—FILING OF CERTIFICATE OF
DEATH—NO AUTHORITY TO REFUSE BURIAL OR
REMOVAL PERMIT TO UNDERTAKER NOT
A RESIDENT OF FLORIDA

Dear Sir:

You request my opinion as to whether or not you have any authority to refuse a permit for the burial or removal of a corpse to an undertaker who is not a bona fide resident of Florida.

You call my attention to the following provisions in Section 9 of Chapter 6892, Laws of Florida, Acts of 1915 (Section 3278 C. G. L.):

"That the undertaker *or person acting as undertaker* shall file a certificate of death with the local registrar of the district in which the death occurred and obtain a burial, removal, or other permit prior to any disposition of the body." (Italics ours.)

You further call my attention to the following provision relating to the qualifications of a person to be examined and licensed by the State Board of Funeral Directors and Embalmers, which appears in Section 8 (2) (a): "He shall be a bona fide resident of the State of Florida."

It is my opinion that you do not have the authority to refuse a burial, removal, or other permit to an undertaker who is not a bona fide resident of Florida. Chapter 6892, Laws of Florida, Acts of 1915, relates primarily to vital statistics and not to the regulation of the profession of undertaking. There is no provision in either Chapter 6892, Acts of 1915, or in Chapter 17950, Acts of 1937, which would authorize you to refuse such a permit. If the provisions of the latter statute are violated, that would be a matter to be dealt with by the officials charged with the duty of enforcing that Act.

November 27, 1940—O-995.

BUREAU OF VITAL STATISTICS—RETENTION OF INDEX
CARDS—CHAPTER 6892

Dear Sir:

This is in reply to your letter of November 26, 1940, in which you state that it has been the custom of the Bureau to copy the information contained

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cards of birth and death certificates on ledger sheets which are bound. Thereupon the index cards are wrapped in paper and placed on the floor of the vault.

It is to be advised as to whether or not it is necessary for the Bureau to continue to preserve the index cards, in view of the fact that the information on them is permanently preserved in bound volumes on a much smaller quantity of paper.

Section 18 of Chapter 6892, Laws of Florida, Acts of 1915, reads in part

"The State Registrar shall further arrange, bind and permanently preserve the certificates in a systematic manner, and shall prepare and maintain a complete and continuous card index of all births and deaths registered."

Since the statute requires the maintenance of the card index, I am of the opinion that the Bureau must continue to preserve the cards until such time as the Legislature shall authorize disposition to be made thereof.

SECTION 16

State Officers — Board of Law Examiners

September 24, 1940—O-941.

APPOINTMENT OF MEMBERS

Dear Sir:

This is in reply to your letter dated today, which reads as follows:

"There are several vacancies on the State Board of Law Examiners and there is some question in my mind as to application of the law, since the Fifth Congressional District has been created.

"I will appreciate your advising me on how the appointments in this instance may be made."

Section 4 of Chapter 10175, Laws of Florida, Acts of 1925 (C. G. L. 1927, Section 4182), reads as follows:

"There is hereby created a State Board of Law Examiners of nine members to be appointed by the Governor, two from each Congressional district, and one from the State at large who shall also be chairman of the board. The appointees shall be attorneys of distinction in the law for their learning and character, and shall have had at least five years' experience in the actual practice of law in this State. The appointments shall be effective on and from July 1, A. D. 1925, for terms as follows: Three for one year, three for two years, and three for three years, according to designation by the Governor. The appointee from the State at large shall be one of those first appointed for the three years. As these terms expire, all appointments thereafter shall be for three years. Appointments to fill vacancies shall be made for the unexpired term."

By limiting the total membership to nine members (two from each of the four congressional districts and one at large), it is clear that the Legislature did not intend that any new congressional district should be entitled to have representation on the Board so as to increase the total membership. The only remaining question is whether or not, in making selections of Board members from congressional districts 1, 2, 3 and 4, you must be governed by the old or the new boundaries of said districts. Although the statute does not expressly deal with this situation, it seems clear that the specification of congressional districts was merely for the purpose of dividing the State into geographical subdivisions for the purpose of obtaining a Board membership representative of the entire State. This purpose could have been similarly accomplished by a legal description of the four areas, but designation merely by congressional districts was a much simpler method of achieving the same result. I am, therefore, of the opinion that in filling a vacancy from any of the four congressional districts, you may appoint the successor from within the boundaries of the congressional district as it existed on June 12, 1925, the date the Board of Law Examiners Act became a law.

SECTION 17

State Officers — Board of Medical Examiners

January 31, 1940—O-716.

DISCRETION TO PERMIT APPLICANT TO COMPLETE
EXAMINATIONS BEGUN BEFORE BASIC
LAW BECAME EFFECTIVE*Gentlemen:*

You request my opinion concerning Dr. * * *, who was an applicant before your board on June 19, 1939. You state that because of becoming ill the last day of the examination, Dr. * * * fell short of the required general average. You particularly inquire whether it will be necessary for Dr. * * * to take the Basic Science Board examinations in view of the fact that his application for license from your board was filed prior to the effective date of the Basic Science Law.

You present what is essentially a practical question in the determination of which your board has a certain amount of discretion. If Dr. * * * was prevented from completing the examinations by reason of illness, then it would be my opinion that your board could permit him to complete the unfinished examinations without requiring a certificate of proficiency from the Basic Science Board. If, however, Dr. * * * did complete your examinations, but failed to meet the required general average, it is my opinion that he must obtain such a certificate of proficiency from the Basic Science Board before he may be permitted to take another complete examination from your board. The Basic Science Act, Chapter 19281, Acts of 1939, does not exempt persons from complying with its requirements merely by reason of the fact that they had applications for licenses on file with your board prior to the enactment of said Act.

September 23, 1940—O-933.

GOVERNOR NOT AUTHORIZED TO APPOINT AN ECLECTIC
PHYSICIAN INSTEAD OF AN ALLOPATH PHYSICIAN*Dear Sir:*

I am in receipt of your letter of the twentieth in which you state that the term of one of the members of the State Board of Medical Examiners has expired and that the law provides that there shall be five Allopaths, three Eclectics and two Homeopaths on the board. You request my opinion as to whether or not the law is mandatory or optional to preserve this ratio of different kinds of physicians on the board, and in reply thereto would state that Section 3405, C. G. L. 1927, provides, in part as follows:

"The Governor shall within thirty days after June 10, 1921, appoint ten

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physicians who shall possess the qualifications specified in Section 3404 to constitute the members of this board. Five members of this board shall be allopath physicians, three shall be eclectic physicians and two shall be homeopathic physicians.

"The successor of each member shall be an appointee in the same manner.

"Said members shall be so classified by the Governor that the term of office of two shall expire in one, three in two, two in three and three in four years from the date of appointment. Annually thereafter the Governor shall appoint two members, each of whom shall serve for a term of four years, and these appointments shall be made so as to preserve the original ratio of allopath, eclectics and homeopathics, respectively."

It is my opinion that since the statute requires that the members of the board *shall* be composed of certain numbers of allopath, eclectics and homeopathic physicians and since their successors *shall* be appointed so as to preserve the original ratio that it is mandatory upon you to preserve this ratio and that you cannot appoint an allopath in place of an eclectic physician, or vice versa, if such an appointment would destroy the ratio required by the statute.

SECTION 18

State Officers—Board of Naturopathic Examiners

September 16, 1940—O-926.

FLORIDA BASIC SCIENCE LAW—CERTIFICATE OF PROFICIENCY
AS PREREQUISITE TO LICENSE*Gentlemen:*

My opinion has been requested by you upon the following questions:

1. Has the Florida State Board of Naturopathic Examiners the right to re-examine applicants without a certificate from the Basic Science Board, who made application and have previously taken the examinations before the Florida State Board of Naturopathic Examiners, before the passage of the Basic Science Law?

2. Has the Florida State Board of Naturopathic Examiners the right to examine applicants who made application to the Florida State Board of Naturopathic Examiners, before the passage of the Basic Science Bill, but who failed to appear for examination?

3. Has the Florida State Board of Naturopathic Examiners the right to examine applicants without a certificate from the Basic Science Board, in physiotherapy and massage, and issue to them a limited license to practice physiotherapy or massage?

In reply to your first question, your board has no right to re-examine applicants without a certificate from the Basic Science Board, since the Act creating your board was passed in 1927 and the Florida Basic Science Law (C. 19281) was passed in 1939 and in Section 4 thereof states that:

"No person shall be eligible for examination * * * unless and until he has presented to the licensing board or other authority empowered to issue such license, a certificate of proficiency in the basic sciences as provided in this chapter. This requirement shall be in addition to all other requirements now or hereafter in effect with respect to the issuance of such license or licenses."

Your second question fails to include the clause as to the right to examine applicants without a certificate from the Basic Science Board but presuming that this was intended by you, my opinion is likewise that you have no such right because of the requirement of Section 4 of the Florida Basic Science law set out in the previous paragraph.

In reply to the third question put by you, I call your attention to Subsection b of Section 2 of the Florida Basic Science Law which defines the meaning of "healing art" as included in such law and such definition is broad enough to include the practice of physiotherapy and massage. Your board, therefore, has no right to examine applicants or issue licenses in physiotherapy or massage, whether limited or unlimited, without a certificate of proficiency from the Basic Science Board.

SECTION 19

State Officers — Board of Osteopathic Medical
Examiners

April 26, 1940—O-793.

APPLICANT WHO FAILED TO PASS EXAMINATION MUST
FURNISH CERTIFICATE FROM BASIC SCIENCE
BOARD—SECS. 4 AND 22, CHAPTER 19281*Dear Sir:*

In view of your letter of the 24th I have considered the questions you submitted in your communication of the 20th.

The question propounded is: Can a person who made application and took an examination before your board and who failed to pass the same, now take a second examination, the Basic Science Act having taken effect during the interval between the first examination and the one he now seeks to take, without furnishing a certificate from said board?

You state that the applicant contends that he should not be required to take an examination before the Board of Examiners in the Basic Sciences on May 25 due to the fact that he had already qualified before this board prior to the effective date of the Basic Science Law. You state further that the applicant contends that a form of contract was entered into between this board and the applicant, which contract has not been carried out by the board until he is granted a second examination.

With the latter contention I cannot agree for the reason I find the general law to be that even though the applicant had received a license to practice, in this instance it does not constitute a contract. 21 R. C. L., Physicians and Surgeons, paragraph 8, has very aptly stated the law. I quote the same:

"A license issued to a physician gives to him a mere naked privilege of practicing medicine or, better, an immunity from punishment because of practice without a license. It does not give to him any further affirmative rights such as the right to continue to practice free from police regulation by the State. It has been asserted that the granting, by the State, of a license for an indefinite period of time to engage in a particular trade or profession is in the nature of a contract and the licensee is thereby vested with the right to continue in such trade or profession. This position, however, is not tenable, and is based on an erroneous idea of the rights conferred by such a license. The granting of a license in such cases is merely the means taken by the State, in the exercise of its police power, to regulate and restrict the engaging in certain professions and occupations for the public good, and confers upon the licensee no rights whatever, in the way of a contract with the State."

I also find in the same work in paragraph 5 that the Legislature could require a physician who was already practicing under a license from a State

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board to take another examination before being permitted to practice further. I quote the pertinent part of said section:

"As no one has a vested right to practice medicine free from State regulation and control, it follows that present or prior practitioners cannot, against a statute which provides that they must secure a license before practicing further, raise the constitutional objection that they are being deprived of property without due process of law * * *."

While the above rules of law apply primarily to physicians and surgeons, they are by analogy equally applicable to the contention of the applicant and I think sufficiently dispose of same.

The only other question to determine is whether or not the applicant is entitled to take this examination without first furnishing a certificate from the Basic Science Board since he at the time of the effective date of the Act had his application before your board.

I do not find any provision in the statute that would permit the applicant to now take the examination without first furnishing you a certificate from the Basic Science Board. As a matter of fact, Section 4 provides:

"No person shall hereafter be eligible for examination or permitted to take an examination for a license to practice the healing art or any branch thereof or be granted any such license unless and until he has presented to the licensing board or other authority empowered to issue such license, a certificate of proficiency in the basic sciences as provided in this Act * * *." Chapter 19281, Laws of Florida, Acts of 1939.

Certain exceptions are made with regard to persons who had practiced prior to the effective date of the Act.

I also find that Section 22 of said Act provides:

"Any person who knowingly issues or participates in the issue of a license to practice the healing art or any branch thereof (1) to any person who has not presented to the licensing board a valid certificate from the State board of examiners in the basic sciences * * * shall be fined not more than five hundred (\$500.00) dollars or imprisoned not more than one (1) year, or both, in the discretion of the court."

I think it is your duty as an administrative officer in view of the foregoing language of the Act to follow the same. If the applicant feels that some construction favorable to him should be placed thereupon, he may resort to the courts but until the courts have instructed your board to give a further examination, I do not believe, under the circumstances, it would be proper for you to do so.

STATE OFFICERS — Board of Osteopathic Medical Examiners

June 8, 1940—O-848.

ISSUANCE OF LICENSE TO PRACTICE—NECESSARY FOR
CERTIFICATE UNDER BASIC SCIENCE ACT

Dear Sir:

This is in reply to your letter of June 3, 1940, in which you state that Dr. Walter Amos Kirk, the holder of Certificate No. 254, issued by the Osteopathic Medical Examiners Board on January 23, 1923, has made application for issuance of a new license pursuant to the provisions of Compiled General Laws of Florida, Section 3420.

Chapter 12287, Laws of Florida, Acts of 1927, provides for the creation of a State Board of Osteopathic Medical Examiners. Section 2 of that Act (C. G. L., Sec. 3418) reads as follows:

"It shall be unlawful for any person to practice osteopathic medicine and surgery without a license."

Section 4 of the same Act reads as follows:

"The holder of a license or certificate heretofore issued under the laws of this State authorizing the practice of osteopathy shall present to the said board said license or certificate and a new license or certificate under this Act shall be issued to the holder thereof."

You ask to be advised as to whether or not it is in order for the board to issue a license to Dr. Kirk under the provisions of Section 4 of this Act quoted above.

The 1939 session of the Florida State Legislature enacted Chapter 19281, providing for the establishment of a State Board of Examiners in the Basic Sciences. Sections 3, 4 and 5 of that Act read as follows:

"Section 3. There is hereby established a board of examiners of the basic sciences to consist of five (5) members authorized and directed to conduct written examination of *all persons who shall hereafter desire to apply for a license to practice the healing art*. Said examination shall cover the five (5) following basic sciences, viz.: 1—Anatomy; 2—Physiology; 3—Chemistry; 4—Pathology; 5—Bacteriology." (Italics supplied.)

"Section 4. No person shall hereafter be eligible for examination for a license to practice the healing art or any branch thereof or be *granted any such license unless and until he has presented to the licensing board or other authority empowered to issue such license, a certificate of proficiency in the basic sciences as provided in this Act*. This requirement shall be in addition to all other requirements now or hereafter in effect with respect to the issuance of such license or licenses." (Italics supplied.)

"Section 5. This Act shall not be construed as applying to dentists, pharmacists, nurses, optometrists, chiropodists and Christian Scientists prac-

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ticing within the limits of their respective callings; *nor to persons licensed to practice the healing art or any branch thereof in the State of Florida at the time this Act first takes effect*, nor to persons specifically permitted by law to practice without licenses who practice each within the limits of the privileges thus granted them." (Italics supplied.)

The license issued to Dr. Kirk in 1923 did not authorize him to practice osteopathy after the effective date of the 1927 Act (Chapter 12287). The Basic Science Act is applicable to all persons who, after the effective date thereof, apply for a license to practice the healing art. Although your letter does not state definitely the date of Dr. Kirk's application, we assume that it was after the effective date of the Basic Science Act. The Basic Science Act forbids the granting of a license to anyone to practice the healing art until he has presented the licensing board a certificate of proficiency in the basic sciences, as provided in the Basic Science Act.

By reason of the fact that Dr. Kirk did not hold a license authorizing him to practice osteopathy at the time of the effective date of the Basic Science Act, I am of the opinion that the provisions of that Act are applicable to him and to the Board of Osteopathic Medical Examiners, with respect to this application, and that the board is not authorized to issue a license to him under Chapter 12287, Laws of Florida, Acts of 1927, unless and until he has presented to such board a certificate of proficiency in the basic sciences as provided in the Basic Science Act.

SECTION 20

State Officers—Citrus Commission

September 1, 1939—O-560.

CONSOLIDATION OF WORDING OF ADVERTISING STAMPS FOR
GRAPEFRUIT, ETC., NOT AUTHORIZED*Dear Sir:*

This will acknowledge receipt of your letter of August 31 to which you attached copy of a letter from the Florida Citrus Commission in which they set forth advantages to be derived by consolidating the three series of citrus advertising stamps as required under Chapters 17780, 17781 and 17782, Laws of Florida, Acts of 1937, into one series to be designated "Orange, Grapefruit, Tangerine Advertising Stamps."

You request me to advise you if in my opinion such consolidation may be made in accordance with the provisions of the above chapters.

In reply I wish to advise that I have carefully examined these three Acts and I find that the tax levied is different for each fruit, i. e., grapefruit 3 cents, oranges 1 cent and tangerines 5 cents, and that each of the Acts provides, with the exception of where the words "grapefruit," "oranges" and "tangerines" appear in the Act relating to these fruits, the following:

"* * * The payment of such taxes shall be evidenced by stamps to be known and designated as 'Grapefruit Advertising Stamps,' with the amount paid for such stamps indicated thereon, which stamps shall in every instance be affixed to the grade certificate or certificates showing the grade of the grapefruit covered thereby, when such grapefruit is required by law to be inspected for grade and certification thereof, and in all other cases such stamps shall be affixed to the returns provided for in Section 9 hereof * * *."

Evidently the Legislature had some good reason for not combining the language I have above quoted so as to apply to citrus fruit generally. It would have been very easy to have substituted the word "citrus" for "grapefruit," etc., in the provision relating to the stamps, and I am unable to determine from my examination of these Acts any intention by the Legislature to the contrary. With the wisdom of an Act of the Legislature or the manner in which a law is to be administered, I have no concern as this is a matter wholly for the Legislature to determine.

The language of these Acts is very clear and I feel that I would be unwarranted in adding any language that would affect the consolidation of the Acts or to so construe them as to carry out an intention that I cannot say was the purpose of the Legislature in enacting the law.

I might add that if only one series of stamps was used, it is possible that it would affect the auditing of the accounts of your office and I understand

STATE OFFICERS — Citrus Commission

that it would seriously complicate the auditing of the accounts of the Citrus Commission. The Legislature may have taken this into consideration in passing the Acts in the form in which they became a law, but as I have said before, that is a matter for the Legislature to determine.

I therefore answer your question in the negative.

SECTION 21

**State Officers — Commissioner of Agriculture,
Bureau of Inspection**

July 17, 1939—O-477.

SEEDS LAW—CERTIFICATION OF WATERMELON SEED

Dear Sir:

With your letter of the 14th instant you submit copy of Chapter 19432, Laws of Florida, Acts of 1939, and ask if it will be in keeping with this law to certify watermelon seed covering such items as are possible at this season of the year, and extending to the final preparation of seed for the market. You also state, "It is understood that a thorough inspection including this growing season is not now possible."

The quoted sentence from your letter might be said to answer your question. However, I wish to express the view that a satisfactory answer to the question on which you have asked my opinion rests on two determinations:

(a) You must determine in the first place what is by the Act intended to be covered by your certificate. Section 2 of the Act in defining the term "Certified Seed" uses the term "reasonably free from diseases and other defects." The word "diseases" as applied to seeds covered by the Act is perhaps well known and understood to producers and handlers of the different varieties of seeds included in the Act. The term "other defects" and what was intended to be covered by that term may possibly be likewise known to the producers and handlers of seed.

(b) After you have determined what is intended to be covered by your certificate by reason of the use of the term "reasonably free from diseases and other defects," it will then be necessary to determine what inspection is necessary, that is, at what period of growth such inspection shall begin and the intervals of inspection down to and through the preparation of the seed, to the end that your certificate will afford to the farmer or planter of such seed that degree of protection that was intended by the Legislature in the enactment of said Chapter 19432.

If you have made the determinations outlined in Suggestions (a) and (b) herein, and have made or can yet make the inspection intended and required by the Act as applied to watermelon seed, I see no reason why you cannot make the certificate referred to in your letter.

In my opinion this Act was intended primarily for the protection of farmers and planters of seeds covered by the Act, and that such planters might with reasonable safety depend upon the certificate in said Act provided for in the purchase and use of the seeds covered by the Act.

STATE OFFICERS—Commissioner of Agriculture, Bureau of Inspection

April 22, 1940—O-792.

**STATE WITHOUT AUTHORITY TO ENFORCE EGG LAW AS TO
SALES TO ARMY OR NAVY POST WHEN MADE ON
LANDS UNDER UNITED STATES JURISDICTION***Dear Sir:*

By Section 5 of the Revised General Statutes of Florida, the United States is authorized and empowered to purchase, acquire, hold, own, occupy and possess lands within the limits of the State of Florida as sites on which to erect and maintain forts, magazines, arsenals, dockyards, and other needful buildings, and by Section 7 the Governor of Florida is authorized in the name and on behalf of the State to cede to the United States exclusive jurisdiction over the lands so reserved, purchased, or acquired, the United States to hold, use, occupy or possess and exercise said jurisdiction over the same for the purposes aforesaid and none other, and thereupon the State shall have concurrent jurisdiction with the United States over said lands only to the extent and purpose of executing all process, civil or criminal, issuing under authority of the State or of any of its courts or judicial officers.

Upon the basis of this exclusive jurisdiction of the United States over such lands, it is my opinion that the State of Florida is without authority to enforce the Florida Egg Law as to sales made to the Army and Navy posts, when said sales are made on said lands as to which the jurisdiction has been ceded to the United States as provided in said Section 7.

October 23, 1940—O-968.

**COMMISSION OF INSPECTOR TO COVER PERIOD FIXED BY
GOVERNOR WHEN MAKING APPOINTMENT***Dear Sir:*

In your letter of the 23rd instant you state the Governor has transmitted to your office his appointment of an inspector for the Bureau of Inspection, Department of Agriculture, for a period of one year from November 1, 1940, and thereupon you ask whether you can issue a commission for a term of one year, or whether the Commission should read "at the pleasure of the Governor, not to exceed four years."

The answer to this question is controlled by the following provision found in Section 221 of the Compiled General Laws of Florida, 1927:

"Commissions issued to such inspectors shall run from the date thereof during the pleasure of the Governor not exceeding the term of four years,
* * *"

It is nowhere provided that the term of office shall be four years or any other fixed period, and as I construe this provision it authorizes the Governor

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at his pleasure to fix the term at anything he sees fit, provided it does not exceed four years.

It is therefore my opinion that where the Governor in the exercise of his pleasure and authority under said statute makes an appointment of an inspector for the Bureau of Inspection for any given period not exceeding four years, the commission should be issued to cover the period so fixed by the Governor.

December 27, 1940—O-1019.

**FERTILIZER—INSPECTION—DRAWING OF SAMPLES BY
NONCOMMISSIONED INSPECTORS**

Dear Sir:

You call my attention to the statute relating to the sampling of fertilizer. You state that some of your field inspectors are commissioned by the Governor while others are not. You further state that up to the present time, you have restricted the inspection work of noncommissioned men to certain activities required under statutes which authorize the employment of inspectors by the Commissioner of Agriculture. You now request my opinion as to whether noncommissioned inspectors may legally draw samples of fertilizer.

Section 3 of Chapter 16999, Laws of Florida, Acts of 1935 (the Fertilizer Inspection Law), makes it the duty of the State Chemist to analyze samples of commercial fertilizer that may be offered for sale in this State. For the purpose of making such an analysis, the State Chemist is authorized to take or have taken by an *inspector of the Bureau of Inspection* of the State Department of Agriculture or by one on whom the powers of inspector are, by that statute, conferred, official samples from any lot of commercial fertilizer offered for sale or sold within the State. The method of drawing that official sample is set out in detail.

I do not find that under Chapter 16999, the powers of an inspector are conferred upon any persons other than inspectors of the Bureau of Inspection of the State Department of Agriculture. To answer your inquiry, it is necessary only to determine whether inspectors of the Bureau of Inspection of the State Department of Agriculture are State officers, so as to require them to be commissioned by the Governor. It is clear that insofar as the inspection of fertilizer is concerned, such inspectors are State officers. They are appointed pursuant to the provisions of Chapter 10149, Laws of Florida, Acts of 1925, as amended by Chapter 11998, Acts of 1927 (Section 221, Compiled General Laws. In the case of *State ex rel. Woodworth v. Amos*, 123 So. 749, the Supreme Court of Florida decided that such inspectors are officers. (For a discussion of statutory methods of drawing samples of fertilizers under the former law which was similar to the law now in effect, see *Walker Fertilizer Co. v. Race*, 166 So. 283.)

STATE OFFICERS—Commissioner of Agriculture, Bureau of Inspection

This opinion is not to be construed as indicating that all inspectors must, by reason of their duties, be state officers. Inspection duties can be performed under the direction and supervision of the Commissioner of Agriculture by employees. See *Johnson v. State*, 128 So. 853. With regard to the inspection of fertilizer, however, the statute specifically requires drawing of official samples by inspectors of the Bureau of Inspection of the State Department of Agriculture, who, under the law, are State officers.

SECTION 22

State Officers—Conservation Department

May 23, 1939—O-289.

OYSTERS—WHETHER OR NOT THE PICKING OR HARVESTING
OF COON OYSTERS TO BE USED BY A CANNING FACTORY
MAY BE PERMITTED UNDER SEC. 1807, C. G. L., 1927

Dear Sir:

I am in receipt of your letter of the 22nd, requesting my opinion as to whether or not you can permit the picking or harvesting of coon oysters by canning factories in this State, and further stating that these coon oysters are on bars owned by the State.

In reply thereto I would state that Section 1807, Compiled General Laws of Florida, 1927, provides as follows:

"All oysters and clams taken from the natural reefs of this State shall be culled, unless otherwise herein provided for, upon their natural reefs as taken. All oysters which measure less than three inches from hinge to mouth, and all bedded shells shall be immediately replaced and scattered broadcast upon the natural reefs from which they are taken. All clams under two inches, measured from hinge across at widest point, shall be returned to the bottom of the bed from where taken. In the determining what oysters shall be removed from marketable oysters, no oyster under three inches from hinge to mouth shall be included in the percentage of oysters under size: Provided, they adhere to the marketable oysters so closely that to remove the same would destroy either the oyster under size or the marketable oyster. No captain or person in charge of any vessel, and no canner, packer, commission man, dealer, or other person shall have in his possession off the natural reefs any natural reef oysters not culled according to law, unless permitted by the said Commissioner of Agriculture for the purpose of planting as herein provided for, nor shall he have any clams less than two inches as herein described, in his possession off of any clam bed. An excess of over 5 per cent of bed shells and small oysters or clams estimated as above provided for in any cargo or lot of oysters or clams shall be considered a violation of this Article, and the Shell Fish Commissioner or any of his deputies or any police officer of the State of Florida, are hereby authorized to cause to be measured up the whole or a part of said cargo or lot of oysters or clams at the expense of such person or vessel, to determine said percentage when found necessary."

If the coon oysters meet the specifications required under this section of the law and the factories or those gathering the oysters for them are otherwise qualified under the law to gather oysters, I see no reason why you should not permit these oysters to be gathered.

STATE OFFICERS — Conservation Department

January 17, 1939—O-92.

**CRAWFISH UNDER 1 POUND—POSSESSION PROHIBITED
FOR ANY PURPOSE***Dear Sir:*

Replying to your letter of the 13th instant, I beg to advise that Chapter 14702, Laws of Florida, Acts of 1931, makes it unlawful for any person, firm or corporation or association of persons at any time to have in their or its possession any salt water crawfish weighing less than one pound avoirdupois for any purpose whatsoever.

This inhibition in my opinion applies to such crawfish whether alive, dead, or cooked.

July 11, 1939—O-468.

**AUTHORITY TO REGULATE COMMERCIAL FISHING IN
LAKE ISTOKPOGA***Dear Sir:*

I am in receipt of your letter of the 7th, in which you inquire as to what department has jurisdiction over Lake Istokpoga in Highlands County. You refer us to Chapter 13644, Laws of Florida, 1929, as authority for your jurisdiction over this lake. An examination of the statutes discloses that the Legislature in 1929 also passed Chapter 14598, which is as follows:

"Section 1. That upon this Act becoming a law it shall be unlawful for any person to take fish from the waters of Lake Istokpoga in Highlands County, Florida, with seines of any size or dimensions, except by permission of the County Commissioners of said County, together with a permit from the Commissioner of the Department of Game and Fresh Water Fish of the State of Florida.

"Section 2. Any person convicted of a violation of this Act shall be punished as if for the violation of any other misdemeanor.

"Section 3. All laws and parts of laws in conflict herewith be and the same are hereby repealed."

It appears from this Act that the County Commissioners of Highlands County and the Department of Game and Fresh Water Fish have jurisdiction over this lake, at least to the extent of regulating seining in it. This Act, being a local law, would take precedence over the general law passed at the same session of the Legislature. See *Saunders v. Howell*, 73 Fla. 563, 74 So. 802.

SECTION 23

State Officers—Department of Public Safety

July 14, 1939—O-471.

CONSTRUCTION OF MOTOR VEHICLE DRIVERS LICENSE LAW,
RE: LICENSE FEES AND COUNTY JUDGE'S FEES*Dear Sir:*

In your letter of the 13th instant you request my opinion as to whether the fee of 5 cents allowed each county judge for each 50-cent license issued by him and the fee of 10 cents for each \$1.00 license issued by him under the provisions of Chapter 19551, Laws of Florida, Acts of 1939, are to be deducted from said 50-cent license fee and the \$1.00 license fee, respectively, or whether to be collected in addition to the said license fees.

Section 33 of Chapter 19551, after fixing the fees allowed each county judge, requires that all license moneys "except the judge's fees as aforesaid" shall be promptly remitted to the Commissioner not later than ten days after the same has been collected. The quoted provision clearly indicates a legislative intent that the county judge's fees are to be deducted from the license fees paid, rather than to be collected in addition to said license fees.

You further inquire whether the county judges under said Act are authorized to charge applicants for operator's or chauffeur's license for administering the oath required to the application for such operator's or chauffeur's license.

Section 20 of the said Act provides that every application for an instruction permit or for an operator's or chauffeur's license shall be verified before a person authorized to administer oaths, "and officers and employees of the Department are hereby authorized to administer such oaths without charge * * *."

"Department" is defined in Section 13 of Article III of said Act as follows:

"The Department of Public Safety of this State, acting directly or through its duly authorized officers, agents and employees, and through the assistance of the Motor Vehicle Commissioner, the several tax collectors, sheriffs, and other officers as hereinafter provided."

Section 26 of the Act provides:

"The Department shall (upon payment of the required fee), issue to every applicant qualifying therefor an operator's or chauffeur's license as applied for * * *."

Again in Section 33 of the Act it is provided:

"Licenses shall be issued by said Judges pursuant to the provisions of this Act, *and subject to the direction and supervision of the Department of Public Safety.*" (Italics supplied for emphasis.)

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Considering together and giving effect to all these provisions, I am of the opinion that it is the legislative intent that each county judge in the performance of duties required of him under this Act, acts as an officer or agent of the "Department," and in that capacity is required to administer "without charge" the oath taken before him to applications for an instruction permit, and an operator's or chauffeur's license required by Section 20 of Chapter 19551, Acts of 1939.

July 22, 1940—O-873.

**AUTHORITY FLORIDA HIGHWAY PATROL TO STOP MOTORISTS
TO ASCERTAIN IF PROPERLY LICENSED**

Dear Sir:

I am in receipt of your letter of the 17th. In said letter you requested my opinion as to the authority of the patrolmen of the Florida Highway Patrol to stop motorists and truck-drivers to check their driver's license.

Section 5, Chapter 19551, Acts of 1939 (Sec. 4151 [619], Compiled General Laws, Permanent Supplement), provides:

"It shall be the duty of said Patrol Officers of the Florida Highway Patrol, under the direction and supervision of said Director, to perform the following duties and functions:

"(a) To patrol the public highways and to enforce all State laws now in effect, or hereinafter enacted, regulating and governing traffic, travel and public safety upon the public highways, and providing penalties for violations thereof, including the operation, regulation and licensing of motor vehicles and drivers thereof, and other vehicles thereon, with full police power to bear arms and to arrest persons violating said laws, * * *."

Section 15 of Chapter 19551, Acts of 1939 (Sec. 4151 [629] Compiled General Laws, Permanent Supplement, provides:

"No person, except those hereinafter expressly exempted shall drive any motor vehicle upon a highway in this State unless such person has a valid license as an operator or chauffeur under the provisions of this Act. No person shall operate a motor vehicle as a chauffeur unless he holds a valid chauffeur's license."

It is my opinion, therefore, that the patrolmen of the Florida Highway Patrol are authorized and required under the aforequoted Section 5 of Chapter 19551, Acts of 1939, to enforce the State Operators' Licensing Law, and the power to stop motorists to ascertain if they be properly licensed is an incidental power necessary to the proper enforcement of this law of our State.

STATE OFFICERS — Department of Public Safety

July 23, 1940—O-874.

MOTOR VEHICLES—OPERATION BY NONRESIDENTS WITHOUT
OBTAINING OPERATORS' LICENSES*Dear Sir:*

You propound three questions which I shall separately state and answer, as follows:

First: Does a person from another State who is merely visiting in Florida have to have a Florida driver's license before he can drive a rented car?

This question is to be answered in the negative. I call your attention to Section 50 (a) of Chapter 19551, Laws of Florida, Acts of 1939, which reads as follows:

"Section 50. RENTING MOTOR VEHICLES TO ANOTHER.—(a) No person shall rent a motor vehicle to any other person unless the latter person is then duly licensed hereunder, or in the case of a nonresident, then duly licensed under the laws of the State or country of his residence *except as a nonresident whose home State or country does not require that an operator be licensed.*" (Italics ours.)

Second: Is there a time limit for the use of a driver's license from another State before it is necessary for one to secure a Florida driver's license?

I find no time limit stated in the law. If one becomes a bona fide resident of Florida, however, he is no longer entitled to come within the exemption of Section 16 of Chapter 19551, for such provisions relate to nonresidents only.

Third: Must people from the few States that do not require driver's licenses have to have a Florida driver's license?

It is my opinion that this question should be answered in the negative. While Section 16 of Chapter 19551 does not make any specific reference to nonresidents from States which do not require drivers' licenses, the legislative intent that such nonresidents be exempt is clearly indicated in that part of Section 50 of Chapter 19551, which is set forth in my answer to the first question propounded by you.

August 16, 1940—O-893.

ENFORCEMENT OF SAFETY REGULATIONS PROMULGATED
BY FLORIDA RAILROAD COMMISSION APPLICABLE
TO "FOR-HIRE" MOTOR VEHICLES*Dear Sir:*

You call my attention to Section 5 of Chapter 19551, Laws of Florida, Acts of 1939, which provides that it shall be the duty of the officers of the

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Florida Highway Patrol to * * * enforce all State laws now in effect, or hereinafter enacted, regulating and governing traffic, travel and public safety upon the public highways, * * *. You specifically inquire whether, under the provisions of Section 5 of Chapter 19551, the officers of the Florida Highway Patrol are authorized and required to enforce regulations prescribed by the Florida Railroad Commission pursuant to Sections 7 and 13 of Chapter 14764, Laws of Florida, Acts of 1931. These regulations are substantially the same as the safety regulations promulgated by the Interstate Commerce Commission relating to interstate carriers. The regulations adopted by the Florida Railroad Commission can, of course, apply only to the "for-hire" carriers regulated by the Railroad Commission. The penalty for violation of such regulations is prescribed in Section 15 of Chapter 14764.

The provisions of Section 5 of Chapter 19551, requiring officers of the Florida Highway Patrol to enforce all State laws now in effect, or hereinafter enacted, relating to highway safety, are sufficient, in my opinion, to authorize and require such officers to enforce such rules and regulations as may be lawfully adopted by the Florida Railroad Commission relating to highway safety.

August 29, 1940—O-901.

**CONVICTS DRIVING STATE MOTOR VEHICLES REQUIRED
TO BE LICENSED**

Dear Sir:

You request my opinion as to whether or not a convict, driving a State motor vehicle, is required to be licensed as a driver under the provisions of Chapter 19551, Laws of Florida, Acts of 1939.

It is my opinion that this question must be answered in the affirmative. The purpose of the Florida Drivers' License Law is to promote public safety on the highways. This statute is not intended to be a revenue measure, except insofar as to defray the expenses of issuing licenses and maintaining a highway patrol. One of the primary purposes of the law is to prevent the operation of motor vehicles on the highways of the State by persons who do not have the physical or mental capacity to operate such vehicles. If a convict is to operate a State-owned motor vehicle on the public highways, there is just as much reason to require him to comply with the provisions of Chapter 19551 as any other person.

Before permitting convicts to operate State-owned motor vehicles on the highways, those responsible for directing the activities of such convicts should take necessary steps to see that said convicts are licensed as drivers under the Florida Drivers' License Law. In such cases, the fee would necessarily have to be paid out of State funds.

STATE OFFICERS — Department of Public Safety

September 16, 1940—O-925.

**DEPARTMENT OF PUBLIC SAFETY—AUTHORIZED TO ADOPT
RULES PROHIBITING EXCHANGE OF LICENSE
AND REFUND OF FEE***Gentlemen:*

I have your letter asking for a ruling covering the exchange of operator's license for a chauffeur's license and refunds upon such exchange.

There is no provision in the State Motor Vehicle Drivers' License Act, Chapter 19551, Acts of 1939, Laws of Florida, to cover the exchange of licenses or the making of any refund. Section 14 of the Act empowers the executive board of the Department of Public Safety to make and adopt its own rules and regulations for the administration of the Act.

The Act apparently recognizes that there should be no exchange of licenses, in that, in Section 37 it provides upon conviction of any offense requiring the revocation of license that the person so convicted shall surrender "all operator's and chauffeur's licenses" held by him.

It is therefore my opinion that it is within your power to adopt rules and regulations prohibiting the exchange of licenses and the making of refunds.

September 16, 1940—O-927.

COLLECTION OF UNPAID DRIVERS' LICENSE FEE AUTHORIZED*Gentlemen:*

I have your letter in regard to the collection of a license fee for the previous tax year where it has not been paid by a motor vehicle driver, as required by the provisions of the State Motor Vehicle Drivers' License Act, Chapter 19551, Acts of 1939, Laws of Florida.

The Act itself does not require as a condition precedent to the issuing of a license for any year payment of a license fee for the previous year, nor is any provision made in the Act for collection of the fee by civil action. There is the usual provision making a failure to comply with the requirements of the Act a misdemeanor.

The Occupational License Tax Act passed in 1937 (Chapter 18011) provides in Section 32 for the issuance of a warrant by the officer to whom the license tax is due, directed to any sheriff of the State, commanding him to levy on any real or personal property of the person from whom a license or privilege tax is due and unpaid, whether under that particular Act or any other Act. This is broad enough therefore to authorize the issuance of a warrant for the collection of an unpaid motor vehicle driver's license fee, where the evidence justifies such issuance.

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September 20, 1940—O-934.

**USE OF PHOTOSTATIC COPIES OF DRIVERS' LICENSES
NOT AUTHORIZED***Dear Sir:*

This is in reply to your letter of September 19, in which you request my opinion as to whether a photostatic copy of a driver's license, with fingerprints of the licensee on the back thereof, can be used by a driver in the place of the original license. Quite obviously, this would be very convenient, particularly for persons who do not drive the same car all the time.

I call your attention to Section 27 of Chapter 19551, Laws of Florida, Acts of 1939, which reads as follows:

"Section 27. LICENSE TO BE CARRIED AND EXHIBITED ON DEMAND.—Every licensee shall have his operator's or chauffeur's license in his immediate possession at all times when operating a motor vehicle and shall display the same, upon demand of a justice of the peace, a peace officer, or a field deputy or inspector of the Department. However, no person charged with violating this Section shall be convicted if he produces in court an operator's or chauffeur's license theretofore issued to him and valid at the time of his arrest."

Section 27, above set forth, contemplates that a driver must have his original license in his possession when operating a motor vehicle. I do not believe that the law would authorize the official sanction by your Department of the use of photostatic copies of the license in lieu of the original.

November 9, 1939—O-649.

**ARRESTS BY HIGHWAY PATROL FOR STATE TRAFFIC
LAW VIOLATORS AUTHORIZED***Dear Sir:*

In your letter of November 8, 1939, you ask the question:

"Whether or not Patrol officers are authorized by law to make arrests for State traffic law violations under the authority of warrants duly issued by proper magistrates."

The Public Safety Act, Chapter 19551, Acts of 1939, in Section 5 (a) authorizes patrol officers of the Florida Highway Patrol:

"To patrol the public highways and to enforce all State laws now in effect, or hereinafter enacted, regulating and governing traffic, travel and public safety upon the public highways, and providing penalties for violations thereof, including the operation, regulation and licensing of motor vehicles and drivers thereof, and other vehicles thereon, with full police power to bear arms and to arrest persons violating said laws; provided, however, said Patrol Officers shall not be required to patrol city streets, but nothing is

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intended hereby to prevent them, if necessary in enforcing said State traffic laws, from making arrests within the limits of incorporated cities and towns."

Section 5 (b) provides in part:

"Except as specifically authorized herein, said Patrol officers shall not otherwise perform the duties and functions of sheriffs, constables and other law-enforcement officers."

The Criminal Procedure Act, Chapter 19554, Acts of 1939, in Section 15 authorizes arrests by a peace officer:

"(d) When a warrant has been issued charging any criminal offense and has been placed in the hands of any peace officer for execution."

Upon consideration of said provisions and the statutes generally it is my opinion that patrol officers of the Florida Highway Patrol are authorized to make arrests upon warrants duly issued by authorized magistrates charging violations of the laws upon the subjects designated in Section 5 (a) of Chapter 19551.

December 4, 1940—O-1005.

**RATE OF INCREASE OF SALARY OF PERSONNEL OF HIGHWAY
PATROL CONTINGENT UPON SERVICE IN
PARTICULAR CAPACITY**

Dear Sir:

I am in receipt of your letter of December 2 in which you state that several of the Florida Highway Patrolmen have recently been promoted to sergeants and lieutenants, and you ask my opinion as to whether or not the time these officers served as patrolmen should be counted as a part of the year that they serve as a higher officer in determining whether or not they should receive the increase in salary as provided by Section 7 of Chapter 19551, Laws of Florida, 1939.

In response to your inquiry, I would state that Section 7, above referred to, provides as follows:

"The compensation of the employee and officers of the Florida Highway Patrol shall be fixed by the Board, provided however, that such compensation on an annual basis shall not exceed the following:

"Mechanics—Not to exceed \$1,800.00 per annum each.

"Recruits—\$75.00 per month *until* accepted as a Patrol Officer.

"Patrol Officer—\$1,500.00 per year for the first year; thereafter to be increased \$120.00 per year of satisfactory service until a maximum of \$2,000.00 is reached.

"Sergeants—\$1,800.00 per year for the first year; thereafter to be increased \$120.00 per year of satisfactory service until a maximum of \$2,600.00 is reached.

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"Lieutenants—\$2,100.00 per year for the first year; thereafter to be increased \$130.00 per year of satisfactory service until a maximum of \$3,000.00 is reached.

"Captain—\$2,700 per year for the first year; thereafter to be increased \$160.00 per year of satisfactory service until a maximum of \$3,500.00 is reached."

The wording of this statute is unambiguous and it is my opinion that before an officer is entitled to the increase in salary provided for his particular classification, he must serve one year in that particular classification, and that the time he served as an officer of the lower branch of the service could not be counted as part of the year which the Act contemplates he must serve in a particular capacity before he is entitled to a salary increase.

SECTION 24

State Officers — Everglades Drainage District

July 17, 1940—O-868.

TAX SALE—TO WHOM LANDS SHALL BE BID OFF WHEN NO
BIDDERS—FEES OF TAX COLLECTORS*Dear Sir:*

I am in receipt of your letter of the 12th inst., enclosing communication from Hon. Hayes Wood, Tax Collector of Dade County, under date of July 10, 1940.

Mr. Wood refers to interlocutory restraining order by Judge A. V. Long, of the United States District Court for the Northern District of Florida, under date of December 19, 1939, in the case of Rorick, et al., v. Board of Commissioners of Everglades Drainage District, et al. Particular reference is made to paragraph 4 of said interlocutory restraining order reading as follows:

"The tax collectors of the respective counties in which lands of the District lie be and they are hereby enjoined and restrained from bidding off at tax sales of lands in the District upon which acreage taxes or assessments have not been duly paid as required by law, any lands for which there are no bidders who are willing and able to pay the amount of the unpaid acreage taxes or assessments, costs and charges thereon, for anyone other than the Trustees of the Internal Improvement Fund as required by Section 12 of Chapter 6456, Laws of Florida of 1913, as amended by Section 3 of Chapter 7305, Laws of Florida of 1917 (Revised General Statutes of Florida of 1920, Section 1171.)"

Inasmuch as I do not think there should be any sale of the property, it is unnecessary to consider the inquiries with reference to fees of the Tax Collector or whether a separate certificate on each parcel of land should be issued.

With reference to whom the lands should be bid off by the Tax Collector when there are no bidders for the same, the above quoted paragraph 4 of said interlocutory order enjoins the Tax Collector from bidding off at tax sales lands in the district where there are no bidders for anyone other than the Trustees of the Internal Improvement Fund, but the said language does not contain any mandatory order for lands, under such circumstances, to be bid off to said trustees.

The said order, as you will note, is an interlocutory and not a final order. The contention of Rorick, et al., that lands in such cases should be bid off to the Trustees of the Internal Improvement Fund instead of the Board of Commissioners of Everglades Drainage District has not been finally settled but is still being contested in the United States Court. Under various legislative Acts such lands have, for a number of years, been required to be bid

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off to the Board of Commissioners of Everglades Drainage District. Under a settlement between the Trustees of the Internal Improvement Fund and the Board of Commissioners of Everglades Drainage District in September, 1931, all such certificates previously bid off to the Trustees of the Internal Improvement Fund and held by them were delivered to the Board of Commissioners of Everglades Drainage District. Any sales of such lands to the Trustees of the Internal Improvement Fund, pending final determination of the issue involved, would tend to further confuse the situation.

In my opinion, neither said paragraph 4 of the interlocutory order nor any other part of said order makes mandatory that lands be bid off to the Trustees of the Internal Improvement Fund and, pending final decree in the litigation in which such interlocutory order was entered, I do not think that the lands should be bid off to the Trustees of the Internal Improvement Fund.

December 3, 1940.—O-1004.

**REFUNDING BOND PLAN—CONSTITUTIONALITY OF STATUTE
TO BECOME EFFECTIVE UPON A CERTAIN
CONTINGENCY**

Dear Sir:

I am in receipt of your letter of December second in which you state that you have apparently successfully negotiated a refunding plan with the bondholders of the Everglades Drainage District with the aid of a loan from the Reconstruction Finance Corporation, and further stating that before this plan can become permanent the Reconstruction Finance Corporation demands additional legislation granting them certain rights in case of default in payment of the principal and interest of the bonds. You further state that negotiations on the permanent plan might continue until after the next session of the Legislature of Florida convenes and adjourns, and you ask my opinion as to whether or not the Legislature could pass an Act incorporating the demands of the Reconstruction Finance Corporation in it and providing that the Act should not become effective until the issuances, validation and delivery of the refunding bonds.

In answer to your question, I would state that all the Legislature would do, if it passed such an Act, would be to pass the Act and provide that it would become effective upon the happening of a certain contingency or anticipated event. Sec. 18 of Art. III of the Constitution of Florida provides as follows:

"No law shall take effect until sixty days from the final adjournment of the session of the Legislature at which it may have been enacted, unless otherwise specially provided in such law."

In discussing this provision of the Constitution, the Supreme Court of Florida, in the case of *Neisel v. Moran*, reported in 85 So. 346, on page 349, said:

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"The State Legislature has plenary lawmaking power, subject only to the limitations imposed by the State and Federal Constitutions, and may enact any anticipatory statutes that are not forbidden by such Constitutions. The State Constitution expressly provides for the enactment of statutes to take effect after their passage and approval, and after the final adjournment of the session of the Legislature at which they were enacted. Anticipatory statutes are not forbidden; nor are they contrary to the letter or to the spirit of the State Constitution; but the enactment of statutes to take effect at times subsequent to their enactment is expressly contemplated by the Constitution."

In the case of *City of Winter Haven v. State*, reported in 170 So. 100, this same Court had the following to say on this question:

"This court has frequently held that the Legislature may enact a statute complete in itself and provide that it shall go into effect upon the happening of a contingency, such as the affirmative vote at an election provided for in the Act. See *State v. Sammons*, 62 Fla. 303, 57 So. 196; *Nabb v. Andreu*, 89 Fla. 414, 104 So. 591; *P'Pool et al. v. State ex rel. Attorney General*, 93 Fla. 378, 112 So. 59; *Ex parte Lewis*, 101 Fla. 624, 135 So. 147; *State ex rel. Crim v. Juvenal*, 121 Fla. 69, 163 So. 569; *Sparkman v. County Budget Commission*, 103 Fla. 242, 137 So. 809."

It thus appears clear that there is no constitutional objection to the passage of such a statute in our State. The rule is generally stated in *Lewis' Sutherland Statutory Construction*, Vol. 1, Second Edition, page 161, as follows:

"It is agreed by all the authorities that an Act may be valid though its taking effect is made to depend on a future contingent event. The case of the *Cargo of Brig Aurora v. United States* presents an instance of such an Act."

It is therefore my opinion that there is no constitutional objection to the Legislature passing a statute to become effective upon the issuance, validation and delivery of the refunding bonds as above mentioned.

December 12, 1940—O-1010.

BONDS HELD BY STATE TREASURER—TRUSTEES I. I. FUND

Dear Sir:

I have before me letter of Hon. Norton B. Adams, Attorney at Law, Ingraham Building, Miami, Florida, addressed to you under date of the 4th instant, relating to proposed delivery by you to the Board of Commissioners of Everglades Drainage District certain of their bonds held in your office which letter was referred to this office on yesterday.

The said bonds appear to be in two groups: One group of bonds appear to have been forwarded to you by Clerks of the Circuit Courts or the dis-

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trict on account of said bonds being received in lieu of cash for Everglades Drainage District taxes.

In connection with the said group of bonds your attention is called to the Restraining Order of the United States District Court in the Rorick case, under date of December 19, 1939: The first paragraph of said Order restraining you, as Treasurer of the State of Florida, as custodian of the funds of Everglades Drainage District and of the Board of Commissioners of Everglades Drainage District from disbursing or applying the proceeds of acreage taxes *and other funds in your possession* belonging to said Board or to said District, other than the proceeds of ad valorem taxes levied under Chapter 8412, Laws of 1921, except to the payment of the principal and interest of the bonds of said district and of said board and to the payment into the sinking fund of the amounts provided by the statutes of Florida and the resolutions of the defendant board, under which such bonds were issued.

The words "and other funds in your possession" could be considered by the Federal Court as embracing the above mentioned bonds received in lieu of cash for payment of taxes and your delivery of such bonds under such circumstances might be viewed as contempt of the United States District Court in said case, unless the Court specifically authorized the same. I, therefore, advise against such delivery without an Order of the said United States District Court.

The other class of bonds, I understand, were deposited as collateral on a note of the District to the Trustees of the Internal Improvement Fund. Part payment on said note appears to have been made in the settlement between the Trustees of the Internal Improvement Fund and the Board of Commissioners of Everglades Drainage District on September 18, 1931, under provisions of Chapter 14,717, Laws of Florida, Acts of 1931, which statute has been the subject of litigation in the above mentioned case of Rorick, et al., v. Board of Commissioners of Everglades Drainage District and Trustees of the Internal Improvement Fund, which has been for some years and still is pending.

In the record of the above mentioned settlement between the Trustees of the Internal Improvement Fund and the Board of Commissioners of Everglades Drainage District appearing in the printed minutes of the Trustees of the Internal Improvement Fund, Vol. XIX, we find in paragraph 2 of the resolution of said Trustees of the Internal Improvement Fund, page 180, that the said Trustees accepted certain Everglades Drainage District tax certificates and certain certificates of indebtedness conditioned that said certificates of indebtedness should be received by said Board of Commissioners of Everglades Drainage District in payment of Everglades Drainage District taxes on lands owned by the said Trustees in the Everglades Drainage District, or when presented by grantees of the Trustees in payment of Everglades Drainage District taxes on lands within the said District conveyed by said Trustees after the approval of said Chapter 14,717, to-wit: May 20, 1931.

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This condition has not been complied with due to the above mentioned litigation brought by Rorick and other bondholders.

Since it is my understanding that the said note was partially paid by certificates of indebtedness, and since the above resolution of the Trustees of the Internal Improvement Fund was conditioned on the use of such certificates of indebtedness for payment of their drainage district taxes, and since such condition has not been and cannot be complied with on account of the above mentioned Restraining Order of the United States District Court restraining the Board of Commissioners of Everglades Drainage District from accepting anything other than cash in the payment of taxes, I do not think it advisable for the Trustees of the Internal Improvement Fund to pass any resolution authorizing you to deliver such last mentioned bonds to the Everglades Drainage District.

SECTION 25

State Officers—Florida Industrial Commission

January 7, 1939—O-25.

CONSTRUCTION OF LAW RE: PAYMENTS TO MEMBERS TO BE INCLUDED IN ONE-THOUSAND-DOLLAR LIMIT

Dear Sir:

I have your letter of January 2 requesting my opinion as to whether or not payments made to members of the Industrial Commission other than the Chairman from other funds shall be included in the One-Thousand-Dollar limit set up by Section 44 (b) of Chapter 18413, Acts of 1937, which amended Chapter 17481, Acts of 1935. You state that Chapter 18402, Acts of 1937, creates within the Industrial Commission the Division of Unemployment Compensation and the Division of Employment Service, and that under the provisions of this Chapter it has been necessary to incur expenses in carrying out the duties of the Commission by the members other than the Chairman which have been paid from the administrative funds set up under this Chapter.

As you know, Chapter 18402 which created within the Florida Industrial Commission the Florida State Employment Service and the Unemployment Compensation Division was passed prior to the Act which actually created the Florida Industrial Commission, and a careful examination of the latter Act does not disclose any authority for any compensation to the two members other than yourself. As to you, the Act does provide:

"The Chairman of the Florida Industrial Commission shall be paid for the additional duties involved in the administration of this Act such sum as may be agreed upon between the said Chairman and the National Social Security Board."

However, in the Act creating the Industrial Commission, being Chapter 18413, Acts of 1937, particularly Section 44, it limited your compensation for all services to Six Thousand Dollars per year. It, therefore, seems that Chapter 18413 which created the Commission fixed all salaries. As to the other two members other than yourself, it provides:

"The other two members shall receive no salary, but shall receive \$10.00 per day when actually engaged upon their official duties, plus actual traveling and subsistence expenses necessarily incurred when actually engaged in their duties when away from their residence and so engaged. Such per diem and expense allowances shall not exceed a total of \$1,000 per year, per member, and shall be payable out of said fund."

You will note this limitation of the amount which they were to receive per day specified particularly that it was "when actually engaged upon their official duties." It is, therefore, clear to me that this covered all of their duties as members of the Florida Industrial Commission, and regardless of whether they were engaged in the work of the Workmen's Compensation

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Division, the Unemployment Compensation Division or the Employment Service Division, they do so as members of the Florida Industrial Commission and are limited to a per diem and expense allowance of not to exceed \$1,000 per year, per member.

I have read these Acts in pari materia and it seems to have been the intention of the Legislature from these two Acts, that the members other than the Chairman were not required to give all of their time to their duties and were not to receive any compensation for services, and while they did receive a per diem and expense allowance, it was in the nature of expenses rather than as compensation for the work actually done.

Section 44 (b) in part provides as I have above quoted, that the two members other than the Chairman were to receive no compensation of any kind or character except "when actually engaged in their duties when away from their residence and so engaged." It is, therefore, apparent that should they be engaged in the work of the Industrial Commission at their residence, they would receive no compensation whatsoever, and the Legislature in putting the limit of \$1,000 per year, per member, for per diem and expense allowance, evidently did not contemplate that it would be necessary to use more than that amount of money in connection with all of the work done by the two members of the Commission other than the Chairman.

I am, therefore, of the opinion that payments made to members of the Commission other than the Chairman from other funds should be included in the \$1,000 limit set up by Section 44 (b), and same is the maximum amount that said two members should receive from all sources as members of the Florida Industrial Commission.

January 11, 1939—O-26.

**UNEMPLOYMENT COMPENSATION ACT—IDENTIFICATION OF
APPROVED CLAIMANTS NECESSARY**

Gentlemen:

This is in reply to your letter of January 9, 1939, in which you asked to be advised as to whether or not, under the provisions of Chapter 18402, Laws of Florida, Acts of 1937, it is the duty of the Industrial Commission to furnish the Comptroller with the addresses of the persons whose claims for benefits have been approved, in addition to furnishing the Social Security numbers of such persons.

Since, under this Act, the claims of unemployed persons are to be approved by the Commission, or its agent, and are to be paid pursuant to warrants issued by the Comptroller, it is the duty of the Commission to furnish the Comptroller with such information as will reasonably identify the persons whose claims for benefit payments have been duly approved. What constitutes reasonable identification is not a question of law, but one of fact, to be determined, not by the Attorney General, but by the agencies involved.

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January 16, 1939—O-1.

**UNEMPLOYMENT ACT—APPOINTMENT OF PERSONS TO SIGN
REQUISITIONS ON UNITED STATES TREASURY***Gentlemen:*

This is in reply to your letters of January 11 and 12, advising of the motion of the Commission authorizing Mr. Wendell C. Heaton, Chairman, Florida Industrial Commission, and Mr. Harold C. Wahl, Director, Unemployment Compensation Division, to sign requisitions on the United States Treasury, and asking for my opinion as to their authority in the premises.

Section 10 C, Chapter 18402, Laws of Florida, Acts of 1937 (Unemployment Compensation Act), reads as follows:

"Monies shall be requisitioned from this State's account in the unemployment trust fund solely for the payment of benefits and in accordance with *regulations* prescribed by the Commission. The Commission through the Treasurer shall from time to time requisition from the unemployment trust fund such amounts, not exceeding the amounts standing to this State's account therein, as it deems necessary for the payment of benefits for a reasonable future period."

Section 12 B of the same Act reads in part as follows:

"Regulations may be adopted, amended, or rescinded by the Commission and shall become effective in the manner and at the time prescribed by the Commission."

From the above quoted provisions of the Act, it appears that a regulation is the proper method by which the Commission may delegate its power to requisition funds. While no particular formalities are required by the Act in the issuance of regulations, there is no showing that the aforesaid motion was intended to be a regulation of the Commission. It is my understanding that the Commission has from time to time adopted regulations and given to each regulation a definite number. In view of the requirement that the authorization be made by regulation and in view of the issuance of orders entitled regulations by the Commission in the past, it would seem preferable that the same formalities be carried out in this instance.

Your letter states that two individuals were authorized in the motion in order that one could execute the requisitions in the absence of the other. It is not clear from the motion that only one signature is required on the requisition. I would suggest that when the regulation is prepared it contain such language as will avoid the possibility of a construction that both signatures are required on the requisitions.

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January 20, 1939—O-15.

WORKMEN'S COMPENSATION ACT—REFUND OF TAXES AUTHORIZED WHEN PAID BY MISTAKE OF LAW*Gentlemen:*

This is in reply to your letter of January 17 in which you request my opinion regarding the Commission's duty and authority to refund amounts heretofore collected on assessments authorized by Section 51 of the Florida Workmen's Compensation Act from the State, its political subdivisions and municipalities. These amounts were paid in prior to my opinion under date of November 29, 1939, to the effect that the State, its political subdivisions and municipalities were not liable for this assessment except upon salaries of employees engaged in proprietary activities.

By reason of the fact that the moneys so paid were public moneys and for the further reason that they were deposited in the administration fund provided for in Section 50 of the Florida Workmen's Compensation Act rather than the State Treasury, it is my opinion they would not come within the general rule that taxes voluntarily paid, even though illegal, cannot be refunded. In my opinion the Commission has both the duty and authority to refund the amounts so paid.

February 8, 1939—O-39.

WORKMEN'S COMPENSATION ACT—INDEPENDENT CONTRACTOR*Gentlemen:*

This is in reply to your letter of February 6 in which you enclosed a copy of an agreement entered into between MacKay Lumber Company and one J. N. Adkins. You request my opinion as to whether J. N. Adkins is, under this contract, an employee of the MacKay Lumber Company or an independent contractor.

The following is from the opinion of the Supreme Court of Florida in the case of Gulf Refining Co. v. Wilkinson, 114 So. 503, text page 505:

"It is very generally held that the right of control as to the mode of doing the work contracted for is the principal consideration in determining whether one employed is an independent contractor or servant. It is also said that the test is whether the employee represents his employer as to the result of the work only, or as to the means as well as the result. If the employee is merely subject to the control or direction of the owner as to the result to be obtained, he is an independent contractor; if he is subject to the control of the employer as to the means to be employed, he is not an independent contractor. 39 C. J. 1316, et seq.

"One who contracts with another to do a specific piece of work for

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him, and who furnishes and has the absolute control of his assistants, and who executes the work entirely in accord with his own ideas, or with a plan previously given him by the person for whom the work is done, without being subject to the latter's orders in respect to the details of the work, with absolute control thereof, is not a servant of his employer, but is an independent contractor.' 18 R. C. L. 492."

It is my opinion that under the principles stated by the Supreme Court of Florida in the case hereinabove referred to J. N. Adkins would be an independent contractor and not an employee of the MacKay Lumber Company.

June 26, 1939—O-2.

CONSTRUCTION OF UNEMPLOYMENT COMPENSATION LAW,
SECTIONS 4 E AND 12 B, CHAPTERS 18402, ACTS OF
1937, AND 19637, ACTS OF 1939

Dear Sir:

This will acknowledge receipt of your letter of June 23 with reference to certain sections of the Florida Unemployment Compensation Law. You state:

"Assistant Attorney General Truett verbally advised this morning that the provisions of the above mentioned Acts required this Commission to adopt a general rule determining seasonal industries and seasonal periods thereof.

"Mr. Truett further advised that this general rule could not be retroactive; that all claims for benefits filed prior to the general rule's effective date must be processed by the Commission.

"This seasonal determination materially affects the interests of the packing and canning industries as well as hotels, clubs and restaurants throughout the State, together with their employees, and it is therefore respectfully requested that the opinion be furnished to this State agency officially."

In reply I wish to advise that it hardly seems necessary for an opinion as to the first question because Section 4 E is so plain. I quote the same:

"E. Seasonal Employment. Any industry, or part of an industry, in which because of the seasonal nature thereof it is customary to carry on a significant portion of the operations at substantially reduced levels of employment during a regularly recurring period or periods of less than one year in length may be deemed a 'seasonal industry'; provided that for this purpose an industry shall not be deemed a 'seasonal industry' unless the members thereof exhibit a reasonable degree of similarity as to functions discharged, types of product produced or service rendered, and period of substantially reduced employment; and provided, further, that none of the provisions of this subsection shall apply to any industry until the Commission shall have determined that such industry is seasonal and shall have determined the seasonal

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period thereof in accordance with general rules prescribed for that purpose by the Commission.

"The Commission shall prescribe general rules for the determination of the seasonal periods of seasonal industries. The Commission shall prescribe rules and regulations with respect to the use for benefit purposes of wage credits based upon wages earned by individuals in industries determined by the Commission to be 'seasonal industries,' notwithstanding any provisions of this Act relating to the use of wage credits for benefit purposes to the contrary."

The portion of said section that I have emphasized is self-explanatory and I am of the opinion that until the Commission has performed the Acts required thereby, this section does not become effective until then.

With reference to the second question, this seems to have been taken care of by Section 20 of the Act which I quote:

"The Legislature reserves the right to amend or repeal all or any part of this Act at any time; and there shall be no vested private right of any kind against such amendment or repeal. All the rights, privileges or immunities conferred by this Act or by Acts done pursuant thereto, shall exist subject to the power of the Legislature to amend or repeal this Act at any time."

I am of the opinion that when the Commission has put into effect Section 4 E that Section 20 then controls and all persons who have claims for benefits by virtue of the fact that they become unemployed by reason of the ending of the season, do not have a valid claim and, therefore, should not be processed by the Commission.

When I discussed this matter with Judge Mack I did not read the Act in full but in going over it today I find Section 20 which I had not taken into consideration in answering verbally the above question.

June 28, 1939—O-439.

WORKMEN'S COMPENSATION ACT—EMPLOYEES OF COMMON CARRIERS EXCLUDED FROM BENEFITS

Dear Sir:

This is in reply to your letter of June 23, in which you call my attention to Section 9 (b) of the Florida Workmen's Compensation Act, which reads as follows:

"(b) No compensation shall be payable in respect of the disability or death of an employee of a common carrier by railroad or express company engaged in intrastate, interstate or foreign commerce."

You request my opinion as to whether Section 9 (b) is to be construed to mean that no employees of the common carriers enumerated in said section would be entitled to claim benefits under the Florida Workmen's Compensa-

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sation Act, regardless of the nature of their duties. It is my opinion that Section 9 (b) excludes all employees of such common carriers from the benefits prescribed in the Florida Workmen's Compensation Act. The nature of the duties of such employees would not be material, so long as the fact remains that they are in the employment of such common carriers.

June 28, 1939—O-25.

**MEMBERS ALLOWED PER DIEM WHEN ENGAGED IN WORK OF
COMMISSION AT THEIR RESIDENCE—YEAR PERIOD FOR
DETERMINING TOTAL AMOUNT THAT MEMBERS
CAN RECEIVE—SECTION 44-(B), CHAPTER
18,413, ACTS OF 1937**

Dear Sir:

This will acknowledge receipt of your letter of June 26 propounding two questions. The first one is:

"Whether or not under Section 44 (b) Mr. Lay, for example, is entitled to the per diem of \$10.00 while attending meetings of the Commission held in Jacksonville, without any expense or subsistence allowance."

You state that Mr. Lay has been allowed the per diem of \$10.00 per day for meetings attended by him in Jacksonville, his residence, but this question has arisen because in our opinion to you of January 7, 1939, we stated that he was to receive no compensation while engaged in the work of the Commission at his residence.

In answering this question, I wish to advise that your construction of our opinion is correct and that he is entitled to the per diem while engaged in the work of the Commission regardless of where he may be, but he is not entitled to any compensation whatsoever while engaged in the work of the Commission at his residence for subsistence or any other expenses.

Section 44 (b) in this regard provides:

"The other two members shall receive no salary, but shall receive \$10.00 per day when actually engaged upon their official duties, plus actual traveling and subsistence expenses necessarily incurred when actually engaged in their duties when away from their residence and so engaged. * * *"

You will note that the proper construction of the above quotation could only be that as I have above set forth.

The next question is:

"I will also appreciate your advising me what constitutes a year for the purpose of limiting the pay of other members of the Commission in accordance with Section 44 (b), that is to say, does the year run from July 1 to June 30, inclusive, or from January to December 31 of each calendar year."

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In answerin that question, I think it would be well to consider the effective date of the Act which is set forth in Section 22 as follows:

"This Act shall take effect July 1, 1937."

I, therefore, am of the opinion that the one year cycle started on July 1, 1937, and that the year would run to June 30 of the following year, which would mean that the year runs from July 1 to June 30, rather than from January 1 to December 31.

June 29, 1939—O-438.

**WORKMEN'S COMPENSATION FUND—PREPAYMENT OF JUSTICE
OF PEACE FEES NOT AUTHORIZED**

Dear Sir:

In reply to inquiries in your letter of June 28, 1939, it is my opinion:

1. That Justices of Peace may require prepayment of costs upon filing an affidavit for a warrant upon a charge of crime unless the party applying for the warrant shall make an affidavit of insolvency and of substantial injury to person or property by him suffered. Section 8490, C. G. L. 1927. The requirement of advance payment of \$5.00, however, seems to be excessive, at least in most counties. Fees of Justices of Peace in most counties are fixed by Section 5237 C. G. L. 1927 at the same amounts as chargeable by Clerks of the Circuit Court under Section 3084 R. G. S. 1920 which lists the fees. State ex rel. Murphy v. Harllee, et al., 100 Fla. 1562, 131 So. 866. Their compensation in counties of more than 100,000 and less than 155,000 is fixed by Section 5237 (1) and (2), C. G. L. 1927; and in counties of population of 3,150 to 3,200 by Section 5237 (3) if said Act was made effective by the referendum therein provided.

2. I find no authority for the Florida Industrial Commission to pay such costs or fees from the Workmen's Compensation Fund.

Section 44 (c) of the Workmen's Compensation Act, Section 5966 (42) C. G. L. 1927 authorizes such expenditures as may be necessary in "the administration of this law," however, the purposes of expenditure mentioned therein and in other sections, together with consideration of Section 5966 (49) C. G. L. 1927, and the purpose of the Act indicate that the cost of criminal prosecutions were not authorized or contemplated by the Act to be paid from the fund thereunder established. This view follows also from application of the settled principle that the authority of boards created by statute is limited to the powers expressly conferred and those necessarily incident to the performance of such powers; and from reflecting that other means have been provided, by the various prosecuting attorneys, for the prosecution of offenses under this Act or other laws.

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July 6, 1939—O-436.

**UNEMPLOYMENT COMPENSATION LAW—CONSTRUCTION
CHAPTER 19637, ACTS OF 1939, WHICH AMENDS CHAP-
TER 18402, ACTS OF 1937, WHICH WAS FLORIDA
UNEMPLOYMENT COMPENSATION LAW***Dear Sir:*

This is in reply to your letter of June 26, 1939, which quotes Sections 13, 14 and 15 of Chapter 19637, Acts of 1939, and concludes with the following statements:

"The Act of 1939 was filed in the office of the Secretary of State and became a law effective June 12, 1939.

"You will note in Section 15 that certain sections become effective on and after July 1, 1939, and all other sections become effective June 12, 1939. Referring to paragraph C (1) (a) of Section 13, the words 'effective date' are used. A difference of opinion has arisen as to what these words mean in this instance, July 1, 1939, or June 12, 1939. It was intended for them to mean July 1, 1939, in order to permit the use of wage credits earned during the first calendar quarter of 1939 in computing benefits for eligible workers. If, however, the law as enacted fixes the date as June 12, 1939, it will freeze the base period of eligible claimants as of December 31, 1938.

"Your opinion is respectfully requested concerning which date is the effective date in the paragraph discussed. Considerable detail work is contingent upon this decision and the Commission will sincerely appreciate advice as soon as possible."

To answer your questions, we must determine the meaning of the words "effective date" as they are used in Section 13 C (1) (a), reading as follows:

"Notwithstanding any provision of Sections 3A and 4 D of the old law to the contrary, the base period of such individual and the period usable in the determination or redetermination of his full-time weekly wage shall in no event extend after the last day of the next to the last completed calendar quarter immediately preceding the effective date, and * * *."

From a reading of Section 15 of the Act, it is apparent that certain sections of the Act become effective on June 12 and that certain other sections of the Act become effective on July 1. Section 3 A defining "base period," clearly falls in the latter class.

Section 13 C (1) states in substance that the old definition of "base period" contained in Section 3 A, shall prevail even after the new Section 3 A goes into effect on July 1; that the old definition is to be in effect only as to certain individuals, but even as to these certain individuals, the old definition of "base period" shall not permit the "base period" to extend beyond a certain number of days before the "effective date." Inasmuch as the words "effective date" are used in a sentence and paragraph dealing with Section 3 A

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of the original Act and the limited effect to be given to Section 3 A of the amended Act as to certain individuals, it would seem that the words had reference to the effective date of the new Section 3 A, which is July 1, rather than to the effective date of some other section of the new Act.

July 12, 1939—O-465.

WORKMEN'S COMPENSATION ACT—APPEALS FROM COMMISSION—CHARGE FOR PREPARING AND CERTIFYING RECORD

Dear Sir:

This is in reply to your letter of June 22, in which you request my opinion as to whether or not the Florida Industrial Commission is authorized to make a charge to defray the expense of preparing transcripts of records in appeals taken to the Circuit Courts from orders and awards of the Commission in Workmen's Compensation cases.

You call my attention to the following provision of Section 27 (b) of the Florida Workmen's Compensation Act:

"The appeal shall be heard by the Circuit Court upon the record certified by the Commission which shall include a copy of the transcript of the evidence taken before the Commission and such other pleadings or instruments or documents filed before the Commission as either party may request."

There is no provision in the Workmen's Compensation Act prescribing any charge for preparing and certifying such records to be used in appeals to the Circuit Courts.

In view of the fact that the primary purpose of the Compensation Act is to afford speedy, effective and inexpensive relief to persons injured in industrial accidents, it is my opinion that the records in appeals should be furnished without cost to those desiring to appeal from orders and awards of the Commission.

August 6, 1939—O-528.

UNEMPLOYMENT COMPENSATION LAW—COLLECTION OF CONTRIBUTIONS BY ISSUANCE OF WARRANT

Gentlemen:

This is in reply to your letter of July 10, 1939, which quotes Section 15 C of Chapter 18402, Acts of 1937, as amended by Chapter 19637, Acts of 1939. This section provides for the collection of Unemployment Compensation contributions by means of the issuance of a warrant to the Sheriff, authorizing a levy on the property of the delinquent taxpayer.

You ask to be advised as to whether such provision applies only to contribution accounts becoming due and payable after June 12, 1939, the effective date of the amending law.

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This is remedial legislation and, as such, should be liberally construed to advance the remedy afforded. Section 15C, in my opinion, allows a new remedy for the enforcement of existing rights, as well as rights which will later accrue. I am further of the opinion that the remedy afforded by it applies to accounts accruing prior to June 12, 1939, as well as to those subsequently accruing.

August 12, 1939—O-530.

**WORKMEN'S COMPENSATION—CLAIMS FOR REFUND OF
COMPENSATION PREVIOUSLY PAID**

Gentlemen:

This is in reply to your letter of August 7, 1939, from which it appears that the employee was found dead in the employer's plant. The employee had no dependents, and the employer's carrier of workmen's compensation insurance paid Florida Industrial Commission the sum of \$500.00 pursuant to the provisions of Section 16 (b) (7) of the Florida Workmen's Compensation Act. Some time later an autopsy was performed by a pathologist, who reported that the employee died of natural causes. The insurance carrier now requests return of the \$500.00 previously paid, and you ask to be advised as to whether or not the Commission is authorized to comply with this request.

I have examined the Industrial Commission's file on this case, and it appears therefrom that from the beginning there was grave doubt as to whether death was caused by a blow on the forehead or by a heart attack. The file also discloses that the insurance company carrier was well aware of this at the time it made payment to the Industrial Commission. Prior to the actual payment, the insurance company had suggested a compromise settlement in view of these doubts. The Commission refused to consider a compromise, and thereafter payment in full was made. Under this set of facts, I am of the opinion that the payment was voluntarily made and cannot be recovered.

August 23, 1939—O-556.

**WORKMEN'S COMPENSATION ACT—ASSESSMENT UNDER
SECTION 51 AGAINST COUNTIES AND CITIES AS "SELF-
INSURERS"—CLASSIFICATION OF GOVERNMENTAL
AND PROPRIETARY ACTIVITIES**

Dear Sir:

You call my attention to my opinion addressed jointly to the Chairman of the Florida Industrial Commission and the State Superintendent of Public Instruction, under date of November 29, 1938.

This opinion related to the liability of County School Boards, Boards of County Commissioners, and Municipalities, to pay assessments authorized under

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Section 51 of the Florida Workman's Compensation Act, as "self-insurers." In that opinion, I stated, in effect, that such assessment constitutes a tax and is not payable by counties and municipalities upon their strictly governmental activities, but is payable by such subdivisions of the State only upon their strictly governmental activities, but is payable by such subdivisions of the State only upon their proprietary activities.

You now request my further opinion as to the proper classification of a number of specific activities undertaken by municipalities. It is sometimes difficult to classify a particular municipal activity as being either wholly governmental or proprietary. In the case of *City of Lakeland v. Amos*, 143 So. 744, the Supreme Court of Florida said the following:

"While the organic law intends that the governmental functions and property of municipalities shall not be taxed, the Constitution does not exempt the authorized corporate business occupations or proprietary activities of municipal corporations from taxation. The Constitution exempts from taxation not municipal corporations, but property that is held and used exclusively for municipal purposes. Section 16, Article 16. See *City of West Palm Beach v. Amos*, 100 Fla. 891, 130 So. 710." Text Page 747.

"* * * That a license tax may be imposed by the Legislature upon municipalities when acting within their proprietary corporate capacity, as distinguished from their governmental capacity, seems to be clear. As it appears that the several complainants are operating and maintaining a public utility as more or less of a business venture, they are, in such capacity, governed by and subject to the same laws as a private corporation engaged in a similar undertaking. *Hamler v. City of Jacksonville*, 97 Fla. 807, 122 So. 220, *City of West Palm Beach v. Amos*, as *State Comptroller*, 100 Fla. 891, 130 So. 710." Text Page 748.

In the case of *Smoak v. City of Tampa*, 167 So. 528, in passing upon the liability of a municipal corporation, for the torts of its servants while engaged in proprietary activities, the Supreme Court of Florida stated:

"(5) Generally the governmental or public duties of a municipality for which it can claim exemption from damages for tort have reference to some part or element of the state's sovereignty granted it to be exercised for the benefit of the public whether residing within or without the corporate limits of the city. All other duties are proprietary or corporate, and in the performance of them the city is liable for the negligence of its employees. *City of Pass Christian v. Fernandez*, 109 Miss. 76, 56 So. 529, 39 L. R. A. (N. S.) 649.

"(4) The difference between governmental and corporate duties is sometimes nebulous and difficult to classify, but there is certainly nothing connected with garbage disposal that partakes of a public or governmental function. It was, consequently, one of the proprietary or corporate duties for the negligent performance of which the city may be held liable. *Kaufman v. City of Tallahassee*, 84 Fla. 634, 94 So. 697, 30 A. L. R. 471; *City of Talla-*

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hassee v. Kaufman, 87 Fla. 119, 100 So. 150; Chardkoff Junk Co. v. City of Tampa, 102 Fla. 501, 155 So. 457; City of Pass Christian v. Fernandez, *supra*." Text page 529.

Upon consideration of the list of specific activities concerning which you inquire, it is my opinion that the following are clearly proprietary:

1. Airport.
2. Cemetery.
3. City docks.
4. City golf clubs.
5. Water works.
6. Light plants.
7. Radio stations.

It is my opinion that the following are governmental activities:

1. Fire department.
2. Police department.
3. Parks.
4. Street cleaning.
5. Maintenance of public buildings.
6. Sewerage construction.
7. Planning board.

It is my opinion that the following cannot be classified either as governmental or proprietary, in the absence of further information:

1. Auto garage shops.—If automobiles used primarily for governmental, as distinguished from proprietary purposes, are stored and repaired in such shops, then the maintenance of same would be a proper governmental function. Otherwise, this would be a proprietary activity.
2. Clerical.—Such persons as do clerical work connected with the governmental functions of a municipality would be engaged in a governmental function—otherwise not.

August 26, 1939—O-552.

WORKMEN'S COMPENSATION ACT CONSTRUCTION OF PARAGRAPH (E), SECTION 39

Gentlemen:

This is in reply to your request for an opinion as to the proper construction to be placed upon paragraph (e) of Section 39 of the Florida Workmen's Compensation Act. According to the enrolled bill on file in the Secretary of State's office, it now reads as follows:

"Where the employer is insured in compliance with the provisions of this Act, the insurance carrier shall be subrogated to the rights and remedies of

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the compensation and the date of the expiration of the policy." Chapter 18413, Acts of 1937.

This sentence is meaningless. Originally it read as follows:

"Where the employer is insured in compliance with the provisions of this Act, the insurance carrier shall be subrogated to the rights and remedies of the employer under the provisions of this Section, so far as equitable." Chapter 17481, Acts of 1935.

The meaning of this language is clear. The 1937 Act amended Section 39 of the 1935 Act, by inserting an additional clause. Aside from the discrepancy shown above, the provisions of Section 39 of the 1935 Act were restated in the 1937 Act. The change brought about by the additional clause above mentioned, was not such a one as would necessitate a change in paragraph (e) of Section 39. It appears that the discrepancy was merely a typographical error, and was not an attempt on the part of the Legislature to amend this particular paragraph of the section. I am, therefore, of the opinion that paragraph (e) of Section 39, in its present form, should be construed as though it were re-enacted in the exact words of the original paragraph. The spirit of the law prevails over the letter, particularly where adherence to the letter would result in absurdity. *59 Corpus Juris*, 967. Mere clerical errors may be corrected by the Court. *59 Corpus Juris*, 991. Amendments should be construed together with the original Act. *59 Corpus Juris*, 1094.

Where a statute is re-enacted in different words and becomes susceptible of more than one construction, it will not be construed as altering the previous statute, unless such alteration is clearly expressed. *59 Corpus Juris*, 1059.

September 1, 1939—O-561.

**WORKMEN'S COMPENSATION ACT—RETURN OF SECURITIES
AND SURETY BOND WHERE SELF-INSURER CEASES BUSINESS**

Gentlemen:

You have asked for my opinion as to what disposition should be made of securities or surety bond deposited by a self-insurer under the provisions of Section 38 (a) of Florida Workmen's Compensation Act (Chapter 17481, Acts of 1935 as amended).

Securities deposited pursuant to that section are for the purpose of authorizing the commission, in case of default in the payment of any compensation awards, to sell the securities and make prompt payment of the compensation award. If a surety bond is deposited, the commission is authorized to bring suit on the bond and thus procure the funds necessary for paying the award.

In view of the fact that a claim for compensation may be lawfully filed at any time within a year after the accident, securities deposited should not be returned until one year has expired since the time when the self-insurer

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ceased business. The form of surety bond prescribed by the Florida Industrial Commission contains the following provision:

"This Bond may be cancelled at any time by the Surety upon giving thirty (30) days' written notice to the Florida Industrial Commission, in which event the liability of the Surety shall, at the expiration of the said thirty days, cease and determine, except as to such liability of the Principal on account of injury or death to any of its employees, as may have accrued prior to the expiration of said thirty days, it being understood that the Surety shall be liable, within the penal sum mentioned herein, for the default of the Principal in fully discharging any liability on its part accruing during the life of this obligation."

Until one year after the date when the self-insurer ceased business, it would be impossible for the commission to know definitely that the self-insurer had not incurred some liability under the Act. No such surety bond should be returned within the one year period, even though the bond has been cancelled by the surety pursuant to the provision above quoted. Cancellation does not affect previously accrued liability.

October 31, 1939—O-637.

**WORKMEN'S COMPENSATION ACT—AGRICULTURAL AND
HORTICULTURAL PRODUCTS—SERVICES OF WORKERS
IN DECORATIVE FOLIAGE COMPANY DO NOT COME
WITHIN CLASSIFICATION OF LABOR**

Dear Sir:

With your letter of September 30, 1939, you enclose copy of a letter received by you from Decorative Foliage Company, signed W. E. Morris, dated September 18, 1939, Leesburg, Florida, in which it is stated that the Decorative Foliage Company grows and prepares for market what is known as asparagus ferns for decorative purposes. That the seeds are planted from which small plants are grown and planted, and when the ferns are grown, they are cut and graded and prepared for the market. You are thereupon asked for a ruling as to whether the services performed by the workers come within the classification of labor employed in the production and handling of agricultural or horticultural products.

It is my opinion that the business of growing, gathering and preparing for market of asparagus ferns for decorative purposes as outlined in the letter of Decorative Foliage Company referred to, comes within the exception set out in Section 2 of 2 (1) of the Florida Workmen's Compensation Act, exempting from the provisions thereof agricultural and horticultural farm labor.

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October 31, 1939—O-629.

WORKMEN'S COMPENSATION ACT—"MOSS GINNING" DOES NOT
CONSTITUTE AGRICULTURAL OR HORTICULTURAL
FARM LABOR*Dear Sir:*

In your letter of the 11th instant you ask my opinion as to whether "moss ginning" constitutes agricultural or horticultural farm labor as excepted from the provisions of the Florida Workmen's Compensation Act by Section 2 (1) thereof.

If I understand the term "moss ginning," it does not constitute either agricultural or horticultural farm labor, and does not come within the excepted provisions of Section 2 (1) of the Florida Workmen's Compensation Act. The Act in question excepts "agricultural and horticultural farm labor," that is, "all labor employed in the production and handling of agricultural and horticultural products in their natural or fresh state, and whether the same be engaged in picking, gathering, harvesting, processing, packing, canning, or handling thereof, or in the hauling of same from the grove or field to the packing house or cannery."

Moss is not produced or grown as the result of labor and cannot, therefore, be classed as an agricultural or horticultural product within the excepted provisions of Section 2 (1) of the Act.

October 31, 1939—O-628.

WORKMEN'S COMPENSATION ACT—STATUS OF EMPLOYER
WHEN EMPLOYEES HAVE REJECTED ITS PROVISIONS*Dear Sir:*

In your letter of the 7th instant you state that a question has arisen as to the status of an employer under the Florida Workmen's Compensation Act, when the employees have rejected its provisions. You use the illustration of an employer having three employees, two of whom have rejected the provisions of the Act in accordance with Section 5 (b) thereof, and ask whether the employer under the circumstances will be considered as having three employees, and therefore obligated to comply with the Act.

The term "employment" by Section 2 (1) is defined to mean where three or more employees are regularly employed in the same business or establishment, and every person carrying on any employment as thus defined is an employer. The fact that all or a portion of the employees elect not to accept the provisions of the law as provided in Section 5 (b) of the Act, does not change the status of an employer as such.

It follows, therefore, that if a person employs three or more persons regularly in the same business or establishment, the person so employing is an "employer" under the terms of the Act, and is bound by the provisions

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thereof, notwithstanding the said employees or any number thereof may elect not to accept the provisions of said law.

November 3, 1939—O-636.

WORKMEN'S COMPENSATION ACT—INDEPENDENT CONTRACTORS—EMPLOYEES—CADDIES—REAL ESTATE SALESMEN—DISTRIBUTORS

Dear Sir:

This is in reply to your request for an opinion as to the legal effect of two contracts, copies of which you enclosed.

The first contract is one between a real estate salesman and a real estate broker. It provides that the salesman shall use his best efforts in selling, leasing or renting any and all real estate listed with the broker, soliciting additional listings and customers and otherwise promoting the business of serving the public in real estate transactions. The broker agrees to assist the salesman in his work by advice, instruction and full cooperation in every way possible. The only restriction on the manner in which the work is to be done is that the salesman must conduct his business and regulate his habits so as to maintain, and to increase, rather than diminish, the good will and reputation of the broker, and must conform to and abide by all laws, rules, regulations and codes of ethics that are binding upon, or applicable to, real estate salesmen. The salesman is to be paid by commissions; the broker is not liable to the salesman for any expense incurred by him, and the salesman is not liable to the broker for office help or expense. The salesman has no authority to bind the broker by any promise or representation, unless specifically authorized in a particular transaction. Suits for commissions shall be maintained only in the name of the broker, and the salesman shall be construed to be a sub-agent only with respect to the clients and customers for whom services shall be performed, and shall otherwise be deemed to be an independent contractor, and not a servant, employee, joint adventurer or partner of the broker. The contract can be terminated by either party at any time upon seven days' written notice.

I am of the opinion that under the aforementioned contract, the salesman is an independent contractor, rather than an employee. He is to have the independent use of his own skill, judgment and means in the execution of the work, and is to have the exclusive direction and control of the manner in which the work is to be done. See annotations contained in 19 A. L. R. 235; 61 A. L. R. 229; 75 A. L. R. 725; 105 A. L. R. 580; also *Barton v. Studebaker Corporation of America*, 189 Pac. 1025.

The other contract mentioned in your letter is one in which the bottling company and the distributor are parties. The distributor is required to collect and carry on accounts with customers, and to assume all losses that may occur in the collection thereof. The company agrees to furnish and service

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a motor truck for the distributor solely for his use in selling and marketing the products of the company to the retailers in the distributor's territory. The distributor agrees to obey the company rules, regulations and requests in the matter of the use, care, maintenance and operation of such truck. The company agrees to supply oil, gas and insurance on the truck and maintain it in operating condition at a fixed rental. The company has exclusive right to assign routes and increase, decrease, re-assign or re-arrange territory of the distributor. The distributor is not allowed to sell the product to persons residing outside the territory allotted to him. Under this contract, I am of the opinion that there is a right on the part of the employer to control the manner in which the work is to be done, and that the distributor is subject to the will of the company under such circumstances as to constitute a contract of employment, rather than an independent contractor relationship. See *Vaughn v. W. F. Davis & Sons*, 221 S. W. 782, and 19 A. L. R. 235.

You also ask to be advised as to whether or not caddies come under the provisions of the Workmen's Compensation Act, where they are kept in a caddy pen and are called out at the request of a player, but while in the pen and on the golf course are under the supervision of the club, so far as their conduct is concerned, and are paid direct by the player, the amount of which payment is fixed by the club.

Schneider on Workmen's Compensation Law (2d) Vol. I, Sec. 17, p. 162, contains the following statement:

"It has been held that a caddie for a golf club, is paid by the member whom he serves, is an employee of the club and not of the member he might be serving at the time of the accident."

To the same effect is *Claremont Country Club v. Industrial Accident Commission*, 163 Pac. 209, *Essex County Country Club v. Chapman*, 173 Atlantic 591, and *Indian Hill Club v. Industrial Commission*, 140 N. E. 871. On the basis of the above authorities, I am of the opinion that a caddy working under the above enumerated conditions, is an employee of the golf club, and, therefore, comes under the provisions of the Workmen's Compensation Act.

November 13, 1939—O-653.

**WORKMEN'S COMPENSATION LAW—RIGHT TO WAGES AS
ESSENTIAL ELEMENT OF "EMPLOYEE" AS USED IN ACT**

Gentlemen:

This is in reply to your letter of October 17, 1939, which reads as follows:

"Will you please give me the benefit of your opinion concerning the following question:

"This situation is where an employer has a relative working for him with or without pay and has two other employees. For the protection of the

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other two employees should not this man be considered as an employer of three persons? One of the insurance companies has requested this information as soon as possible so I would appreciate an early reply."

Section 2 of Chapter 17481, Acts of 1935 (Florida Workmen's Compensation Act), reads in part as follows:

*"When used in this Act.—(1) The term 'employment' includes employment by the State and all political subdivisions thereof, except officers elected at the polls, and all public and quasi-public corporations therein and all private employments in which three or more employees are regularly employed * * *."* (Italics supplied.)

*"(2) The term 'employee' means every person engaged in an employment under an agreement or contract of hire or apprenticeship, express or implied * * *."*

The language last quoted is identical with that contained in the North Carolina statute, which was construed in the case of *Hollowell v. North Carolina Department of Conservation*, 173 S. E. 603. In that case the Court said:

"The sum of the whole matter is that before the provisions of the Workmen's Compensation Act are called into play, the relation of master and servant, or employer and employee, or some appointment, must exist, and this is the initial fact to be established. An 'employee' is one who works for another for wages or salary, and the right to demand pay for his services from his employer would seem to be essential to his right to receive compensation under the Workmen's Compensation Act, in case of injury sustained by accident arising out of and in the course of the employment."

The same principle was reaffirmed in the case of *Borders v. Cline*, 193 N. E. 826. See also *Vaivida v. City of Grand Rapids*, 249 N. W. 826; *Mendoza v. Gallup Southwestern Coal Co.*, 66 Pac. (2d) 426; *Bingham City Corporation v. Industrial Commission*, 243 Pac. 113; *Morris v. Parks*, 28 Pac. (2d) 215; *Burnap v. United States*, 252 U. S. 512; *Mono County v. Industrial Accident Commission*, 167 Pac. 377.

Section 9 (a) provides that compensation shall be payable under the Act with respect to disability or death of an employee, if same results from an injury arising out of and in the course of the employment. Under the above authorities it is clear that the term "employee" as used in Section 9 (a) refers only to those employees receiving wages.

Taking this in connection with the words "when used in this Act" contained in Section 2, it would seem that the term "employment" includes only employments in which three or more persons who receive wages are regularly employed. No reason appears for giving the term "employee" used in Section 2 a different meaning from that used in Section 9 (a).

I am therefore of the opinion that the employer spoken of in your letter would not come under the provisions of the Florida Workmen's Compensation Act, if the relative referred to worked without compensation.

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November 29, 1940—O-996.

**UNEMPLOYMENT COMPENSATION LAW—DEFINITION OF
"WAGES" TAXABILITY OF PAYMENT OF DIFFERENCE
BETWEEN CIVILIAN AND MILITARY PAY***Gentlemen:*

This is in reply to your letter of November 20, 1940, in which you ask to be advised as to whether or not payments made by an employer to his former employees called for active service with the armed forces of the United States, are "wages" within the meaning of the Florida Unemployment Compensation law (Chapter 18402, Laws of Florida, Acts of 1937).

Section III (M) of the aforementioned Act defines wages to mean:

"'Wages' means all remuneration payable for personal services, including commission and bonuses and the cash value of all remuneration payable in any medium other than cash. The reasonable cash value of remuneration payable in any medium other than cash shall be estimated and determined in accordance with rules prescribed by the Commission."

I am of the opinion that payments voluntarily made to such former employees are not for "personal services," and hence are not "wages" within the meaning of the Florida Unemployment Compensation Act.

December 14, 1939—O-672.

**WORKMEN'S COMPENSATION ACT—CONSTRUCTION OF TERM
"EMPLOYEE" AS EMBRACING OFFICERS OF A CORPO-
RATION COMPENSATED BY SALARY OR OTHER-
WISE FOR THEIR SERVICES***Dear Sir:*

You call my attention to the definition of the term "employee" set forth in paragraph (2), Section (2) of Chapter 17481, Laws of Florida, Acts of 1935, as amended by Chapter 18413, Laws of Florida, Acts of 1937, which reads as follows:

"The term 'employee' means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also including minors whether lawfully or unlawfully employed, but excluding independent contractors and excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer."

You request my opinion as to whether the above definition would apply to officers of a corporation, designated as officers in the charter, but who are compensated by salary or otherwise for their services.

The following statement is from 71 Corpus Juris, pages 507-8:

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"The majority of cases adhere to what may be called the dual capacity doctrine; that is, that an officer, director, or stockholder of a corporation will not be denied compensation merely because he is such officer, director, or stockholder if, as a matter of fact, at the time of the injury he is engaged in performing manual labor or the ordinary duties of a workman and receives pay therefor in the capacity of an employee, or if he is engaged in an employment palpably separate and distinct from the official duties falling upon him as an officer of the corporation. Hence, one of the fundamental tests of the right to compensation is not the title of the injured person, but the nature and quality of the act he is performing at the time of the injury, or whether he was performing service for another under a contract of hire. However, if an officer sustains injuries while performing manual or mechanical labor, which is no part of his duties, but in which he acts as a mere volunteer, he is not entitled to compensation. Whether an officer, director, or stockholder is an employee within the act depends largely, in each individual case, upon the particular facts and circumstances of each case, and corporate officers may be employees within the meaning of the act if the facts are such as to constitute them under the law, while on the other hand, where, at the time of the injury the officer is not a workman or employee in the sense that the term is used in the act, he is not entitled to compensation as an employee."

It is my opinion that whether or not a person is an employee within the statutory definition depends upon whether or not he is engaged in an employment separate and distinct from his official duties as an officer of the corporation. If he is so employed, he is an "employee" within the statutory definition, otherwise not.

December 27, 1939—O-682.

UNEMPLOYMENT COMPENSATION LAW AS AMENDED—COMPENSATION FOR ADDITIONAL DUTIES OF MEMBERS

Dear Sir:

This will acknowledge receipt of your letter of recent date propounding five questions in connection with the Florida Unemployment Compensation Law as amended by Chapter 19637, Acts of 1939. You state that "Section 11-A of Chapter 19637, Acts of 1939 * * * reads in part on this subject as follows:

"The other members of the Commission shall be paid for the additional duties involved in the administration of this Act and shall be allowed necessary expenses in connection therewith which compensation and expenses shall be in addition to that provided under the terms of the Florida Workmen's Compensation Act except that the total compensation of the members other than the Chairman for the Administration of this Act shall not exceed \$1200 per annum * * *."

My answer to your Question No. 3 will make it unnecessary to answer any other question. Question No. 3 is:

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"Does the amended Unemployment Compensation Act limit the maximum compensation for the members other than the Chairman to either \$1200 or \$600 each per annum for all their duties incident to their work as members of the Industrial Commission, including the Workmen's Compensation Division; or is the limit intended only for their compensation in connection with the administration of the Unemployment Compensation Law?"

The Legislature by Chapter 19637, Acts of 1939, amended Section 11 of the 1937 Act. This amendment added to Section 11-A the part that I have above quoted and it appears to me that this amendment now allows the Commission to pay to its members, other than its chairman, for the additional duties devolving upon them in the administration of the Florida Unemployment Compensation Law, an amount not to exceed \$1200 per annum, and that this amount is in addition to any sum that they may receive from the Workmen's Compensation Division.

I therefore am of the opinion that the amended Unemployment Compensation Act would allow you to pay \$600.00 per annum to each of the two members of said Commission other than the Chairman and in addition thereto their necessary expenses in connection with the administration of the Unemployment Compensation Law.

January 11, 1940—O-695.

**UNEMPLOYMENT COMPENSATION ACT—COLLATERAL
SECURITY FOR BANK DEPOSITS**

Gentlemen:

This is in reply to your letter stating that the Social Security Board has requested a reply to the following inquiry:

"If the unemployment compensation or administration funds in any one or all of the above-mentioned accounts or funds are secured by collateral or otherwise, please obtain an opinion of the State Attorney General indicating that such action is in accordance with State laws."

The Unemployment Compensation law contains no provision requiring the taking of collateral security for bank deposits, but Section 174 of the Compiled General Laws of Florida, 1927, and Sections 173, 175 and 176 of the permanent supplement thereto, provide for the taking of collateral security for deposits made by the State Treasurer, and these laws apply to funds administered under the Unemployment Compensation Act, as well as to other State moneys. Under date of November 17, 1939, the State Treasurer advised you that deposits to the credit of the Benefit account, the Clearing account and the Administration account, of the Florida Unemployment Compensation Fund, are secured by collateral pledged jointly to these accounts and to other accounts of State funds. The State Treasurer's letter also says that in each instance the collateral is considered to be ample to cover all funds deposited in the bank.

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I am of the opinion that the procedure outlined in the State Treasurer's letter is in accordance with the laws of Florida.

January 11, 1940—O-694.

WORKMEN'S COMPENSATION ACT—LIABILITY IN CASE OF INJURY TO SPECIAL DEPUTY POLICEMEN

Gentlemen:

This is in reply to your letter enclosing a letter from Curtis & O'Neal Co., Inc. to the Florida Industrial Commission, which reads in part as follows:

"The situation in Winter Park is that in addition to their regular police officers, the City has 3 or 4 picked men who have been deputized and are subject to call by the regular officers in case that they need assistance in answering police calls. These special deputies receive no monetary compensation unless they should be used for several days, or unless the particular job they are called on requires subsequent attendance at court or some other proceedings which take them away from their regular work. Ordinarily, however, they receive no compensation whatsoever."

You ask to be advised as to whether or not deputy municipal police officers such as are described in the aforementioned letter, are covered by the Florida Workmen's Compensation Act.

Subsection 1 of Section 2 of the Workmen's Compensation Act provides that the term "employment," when used in the Act, includes "employment by the State and all political subdivisions thereof."

Subsection 2 of Section 2 of said Act provides that the term "employee" includes "every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also including minors whether lawfully or unlawfully employed, but excluding independent contractors and excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer."

In order to be excluded, the employment must be both casual, and not in the course of the trade, business, occupation or profession of the employer. In view of this, the fact that the deputy municipal police officers are only called into service occasionally, would not effect the applicability of the Florida Workmen's Compensation Act, if the service was "in the course of the trade, business, profession or occupation of his employer." See *Barker v. Eddy*, 185 N. E. 878; *Johnson v. Asheville Hosiery Co.*, 153 S. E. 591.

It seems clear that service by a municipal police officer in keeping the peace, is in the course of the trade, business, occupation or profession of the City. See *West Salem v. Ind. Com.*, 162 Wis. 57, 155 N. W. 929, L. R. A. 19180, 1077; *County of Monterey v. Rader*, 199 Cal. 221, 248 P. 912, 47 A. L. R. 359; *Millard County v. Ind. Com.*, 62 Utah 46, 217 P. 974.

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The right to compensation is an essential factor in determining liability under the Act. See my opinion dated November 13, 1939, in re: Right to wages as essential element of employee under Workmen's Compensation Act.

I am, therefore, of the opinion that such deputy municipal police officers are covered by the Workmen's Compensation Act, unless the services performed are of such a nature that they would not be entitled to payment for such services.

January 30, 1940—O-724.

WORKMEN'S COMPENSATION ACT—HIGH SCHOOL STUDENTS AS EMPLOYEES

Gentlemen:

This is in reply to your inquiry as to whether or not high school students who are permitted to work in a place of business a certain number of hours each week without pay, purely for manual training purposes and as a part of their high school course, are employees within the meaning of the Florida Workmen's Compensation Act. Section 5966 (2) Compiled General Laws of Florida, Permanent Supplement, provides that the term "employee," when used in the Florida Workmen's Compensation Act, shall mean " * * * every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also including minors whether lawfully or unlawfully employed, * * *."

The industry may be held liable for injury only where there is a contract of employment, and so the answer to each particular case depends upon whether or not the facts show a relationship of employer and employee. The fact that the worker is also a student does not necessarily preclude the existence of a relationship of employer and employee. The consideration for the work performed may consist of money paid or valuable instruction furnished. In determining whether the relationship of employer and employee exists, it is important to ascertain whether the school authorities obtained the right to direct and control the student in the performance of his vocational duties, or whether that authority vests in the management of the enterprise accepting his services. It is also important to determine whether the industry has the right to hire or discharge the students independently of the school authorities, and whether or not there is a valid consideration for the alleged agreement of employment. See *Union Lumber Company v. Industrial Accident Commission*, 55 Pac. (2d) 911.

You have not advised as to whether the authority to direct the work and the manner in which it should be performed by the student is vested in the management of the industry or in the teacher. Neither are we advised as to whether the management has the absolute right to discharge the worker without consulting the school authorities. While we are advised that the worker receives no pay, we are not informed as to whether or not he receives valuable

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instruction from the enterprise where the work is performed. In the absence of information on these points, we cannot determine whether or not the employer-employee relationship exists between the students you refer to and the enterprises where they may perform work. The above mentioned case is the only authority we find on the question of the status of vocational students under Workmen's Compensation Acts, and it enumerates the factors which must be present in order that a vocational student may also be an employee. An application of the rules laid down in *Union Lumber Company v. Industrial Accident Commission*, to each case, should determine whether or not the relationship of employer and employee exists between the student and the organization where he performs the work.

April 22, 1940—O-791.

**UNEMPLOYMENT COMPENSATION DIVISION—APPOINTMENT
OF DIRECTOR**

Gentlemen:

This is in reply to your letter of April 19, 1940, reading as follows:

"The Social Security Board has advised us that it will be necessary to place the position of Director of the Unemployment Compensation Division under the Merit System. We would appreciate an expression of your opinion as to the propriety of such action. May we refer you to Sections 11, 12-D, and 12-K of the Florida Unemployment Compensation Law as amended.

"We are enclosing a copy of the Standards for a Merit System of Personnel Administration, issued by the Social Security Board on November 1, 1939."

Section 11, Chapter 18402, Acts of 1937, as amended by Chapter 19637, Acts of 1939, Laws of Florida, provides that the Governor shall appoint the Director of the Unemployment Compensation Division and that such appointee shall hold office at the will of the Governor and his salary is fixed by the Governor at a sum not exceeding \$5,000 per year.

Subsection "K" of Section 12 of said Act provides that Commission shall cooperate to the fullest extent consistent with the provisions of this Act, with the Social Security Board, and shall comply with the regulations prescribed by the Social Security Board governing the expenditures of such sums as may be allowed and paid to this State under Title III of the Social Security Act, for the purpose of assisting in the administration of this Act.

Standards for a Merit System of Personnel Administration applicable to the administration of State Unemployment Compensation laws, issued by the Social Security Board on November 1, 1939, require that the position of Director of the Unemployment Compensation Division be included in the Merit System of Personnel Administration. In order for the Commission to comply with Subsection "K" of Section 12 of the Florida Unemployment Compensation law, it is my opinion that it would be proper for a register for the

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position of Director of the Unemployment Compensation Division to be established under the Merit System pursuant to the provisions of Subsection "D" of Section 12 of the Florida Unemployment Compensation Act.

While Section 11 of the Florida Unemployment Compensation Act vests the Governor with power to appoint the Director of the Unemployment Compensation Division, there is nothing in said section, or elsewhere in the Act, which would prohibit his making this appointment from a register for such position established under the Merit System.

June 24, 1940—O-831.

WORKMEN'S COMPENSATION ACT—AUTHORITY OF EMPLOYER TO REJECT WAIVER OF EXEMPTION ON HIS DOMESTIC HELP

Dear Sir:

I am in receipt of your letter of the nineteenth in which you state that an employer waived the exemption on his domestic help as provided by Section 4—(b) of the Workmen's Compensation Law and now desires to withdraw or cancel the waiver of exemption and stating that the law does not provide any method by which this can be done and you ask my opinion as to whether or not such a withdrawal or cancellation may be had.

Section 5 of the Act provides in part as follows:

"5966 (5) Notice of Nonacceptance and Waiver of Exemption.—Notice of nonacceptance of this law and notice of waiver of exemption heretofore referred to shall be given in accordance with the following provisions:

"(a) Every employer who elects not to accept the provisions of this law or who waives such exemption as the case may be, shall post and keep posted in a conspicuous place or places in and about his place or places of business typewritten or printed notices to such effect in accordance with a form to be prescribed by the commission. He shall file a duplicate of such notice with the commission."

This section provides for the nonacceptance of the law; if an employer has accepted the provisions of the law as he did by waiving the exemptions on his domestic employees then under this section by giving the required notice, an employer may signify his nonacceptance and withdrawal from the provisions of the law. The case of *Paucher v. Enterprise Coal Mining Co.*, 164 N. W., 1035 is particularly analogous to this situation. In this case "the employer filed a written notice of rejection of the act with the industrial commission and posted notices about this plant to that effect. Later he accepted the provisions of the act and tore down the notices about the plant. The court held that this was not a sufficient acceptance of the act. The Iowa Act provides that waiver of rejection of the Act shall be accomplished in the same manner as when the Act is accepted. This requires the filing of notice of acceptance with the industrial commissioner and the posting of notices 'in some

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conspicuous place at the place where the business is carried on.' Tearing down the notices was not a substantial compliance with the law."

An employer, to withdraw his waiver of exemption on his domestic help, may do this by posting the notices and filing a duplicate of such notice with the commission, as required by Section 5966 (5).

Since this question has been answered in the affirmative, I see no necessity for answering the second question contained in your letter.

July 19, 1940—O-869.

**WORKMEN'S COMPENSATION ACT—STATUS OF ORIGINALLY
EXEMPT EMPLOYER AFTER WITHDRAWAL OF
HIS WAIVER OF EXEMPTION**

Dear Sir:

This is in reply to your letter of July 11, 1940 in which you ask the following question: Does an exempted employer regain his original status upon withdrawal of his "Waiver of Exemption," or is his status changed to that of a subject employer who rejects the provisions of the Workmen's Compensation Act?

A close study of the Workmen's Compensation Act reveals a very definite legislative policy to create two major classes of employers. These may be designated as subject employers and exempted employers.

The Act makes provision for a drastic penalty to be imposed upon those "subject employers" who elect not to operate under the Act (Chapter 17481, Laws of Florida, Acts of 1935, Section 6.) Such penalty, however, has no operative effect upon exempted employers.

Another section of the Act, Section 4 of said Chapter 17481, as amended by Section 2 of Chapter 18412, Acts of 1937, provides a method whereby "Exempted Employers" may afford themselves and their employees the protection contained in the Workmen's Compensation Act. Nowhere in the Act is there found any language which indicates a policy directed to penalizing this class of employers. That such a distinguishing legislative policy is not unconstitutional, has previously been decided. See Schneider's Workmen's Compensation Law, Vol. 1, Section 13, at page 108, and cases cited on page 109 thereof under footnote 11.

Therefore, it is my opinion that employers who were originally exempted from the provisions of the Act but who had elected to waive these exemptions and secure the protection of the Act for themselves and for their employees, may withdraw such waiver of exemption and revert to their original status of exempted employers.

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July 24, 1940—O-876.

**WORKMEN'S COMPENSATION ACT—CORPORATIONS QUALIFY-
ING AS SELF-INSURERS MUST APPEAR ONLY BY
AUTHORIZED ATTORNEY AT LAW***Dear Sir:*

You call my attention to the opinion of the late Honorable Cary D. Landis, as Attorney General, under date of July 27, 1937. In that opinion, Attorney General Landis ruled that, while an individual not an attorney has the right to represent himself in judicial proceeding including controverted matters before the Industrial Commission or a Deputy Commissioner, such an individual does not have the right to so represent other persons. The problem concerning which you now inquire is whether a corporation, which has qualified as a self-insurer under the Workmen's Compensation Act, can be represented before a Deputy Commissioner or before the Commission by an officer or agent of the corporation who is not an authorized attorney at law.

There is a distinction between representation of an individual and of a corporation in judicial proceedings. An individual can represent himself, but a corporation can only act through its agents. This is the basis for the rule adhered to by most courts that a corporation can only be represented in judicial proceedings by an authorized attorney at law. See the case of *Shortz v. Farrell*, 193 Atl. 20.

I refer you to the case of *State ex rel. Daniel, Attorney General, v. Wells*, 5 S. E. (2d Ser.) 181, decided by the Supreme Court of South Carolina. This case involved substantially the same question as propounded by you. The following is from the opinion of the Court:

" * * * 'A natural person may present his own case in court or elsewhere, although he is not a licensed lawyer. A corporation is not a natural person. It is an artificial entity created by law. Being an artificial entity it cannot appear or act in person. It must act in all its affairs through agents or representatives. In legal matters, it must act, if at all, through licensed attorneys.' "

In determining whether a corporation must be represented by an authorized attorney in matters before the industrial commissioner or a deputy commissioner, it is important to distinguish between matters handled by the industrial commission or the deputy commissioner in an administrative capacity and matters which are essentially judicial in character. Corporations may be represented by agents who are not attorneys in all purely administrative matters. When, however, a matter is to be heard before a deputy commissioner or the commission, acting in a judicial capacity, corporations must be represented by duly licensed attorneys.

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October 19, 1940—O-962.

FLORIDA CHILD LABOR LAWS—SECTION 5950.

Dear Sir:

This will acknowledge receipt of your letter of October 17th. You state:

"Section 5950 of the Florida Child Labor Laws contains the following provision:

"—no person under twenty-one years of age shall be employed, permitted or suffered to work in, about or in connection with any poolroom, billiard room, brewery, saloon or bar-room where intoxicating liquors are manufactured or sold."

"Section 18 of Chapter 18413, Acts of 1937, provides:

"Compensation and death benefits as provided by the Workmen's Compensation Law shall be double the amount otherwise payable if the Commission determines that the injured employee at the time of the accident is a minor employed, permitted or suffered to work in violation of any of the provisions of the Child Labor Laws of Florida. The employer alone and not the insurance carrier shall be liable for the increased compensation or increased death benefits provided for by this section. Any provisions in an insurance policy undertaking to protect an employer from such increased liability shall be void."

You request me to give you an opinion as to whether or not an employee under the age of twenty-one years employed by a hotel where a bar-room is also operated comes within the meaning of the above quoted provision of our Statutes although such employee is not employed in the bar-room itself.

In reply I wish to advise that under date of November 2nd, 1939, I held that

" * * * the Legislature intended by the enactment of Paragraph (j) of Section 11 of Chapter 16774, to change the prohibition contained in Section 5950 (4027), Compiled General Laws, to the extent, but only to the extent that it is not unlawful for persons licensed as retail vendors under the provisions of Subsections III, IV, V, VI, VII, and VII½ of Section 5 of Chapter 16774, to employ persons under the age of twenty-one years, whose disabilities of non-age have been removed, to work in the place of business of such licensed retail vendors."

I am also of the opinion that said Paragraph (j) of Section 11 of Chapter 16774, changed the prohibition contained in Section 5950 further to the extent that it is not unlawful for minors to work in a separate place of business of an employer where said place of business has no connection with nor is the employee required to perform any services in the bar-room. As I said in the opinion of November 2, 1939, "the intent of said enactment was to protect and safeguard persons under the age of twenty-one years from effect of the recognized evil influence of such places." I think it was the intention of

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the Legislature in view of Paragraph (j) of Section 11 of Chapter 16774 to only prohibit the employment of minors "to work in places of business" where liquor is actually sold, and the Legislature did not intend to prohibit a person from working in a hotel although such hotel operates a bar-room where such person has no duties to perform in connection with said bar-room.

I therefore hold that an employee under the age of twenty-one years employed by a hotel where a bar-room is also operated, does not come within the provisions of Section 5950 of the Compiled General Laws where such employee is not employed in the bar-room itself and has no duties to perform in connection therewith.

November 7, 1940—O-982.

RESIGNATION OF CHAIRMAN AND MEMBER MUST BE
ACCEPTED BY GOVERNOR TO BE EFFECTIVE

Dear Sir:

This will acknowledge receipt of your letter of November 6th. You state:

"I have heretofore submitted my resignation as Chairman and Member of the Florida Industrial Commission to the Governor to be effective November 1, 1940, which resignation I am advised has not yet been accepted.

"An emergency exists in that the Chairman is the only member of the Commission certified in Washington to sign papers pertaining to the transfer of Federal funds from one account to the other."

You request my opinion as to whether or not you are "authorized to perform the duties pertaining to transfer of funds from one account to another, the approval for payment of vouchers representing expenses incurred in the administration of the Unemployment Compensation Division, the Florida State Employment Service and the Workmen's Compensation Division of the Commission," until your resignation shall be accepted by the Governor.

The only case I can find that bears any similarity to the question involved that has been passed upon by our Supreme Court is the case of *State v. Crawford*, 79 So. 875. There the Court said:

" * * * Section 298 of the General Statutes of 1906 enumerates the various methods by which offices may be vacated, the second of which is 'by his resignation.' The law is silent as to whether or not such resignation must be accepted by the Governor. If his acceptance is necessary, it may be orally or in writing, or it may be shown by the performance by the Governor of an official act which it would not be his duty, and which he would have no right, to perform, unless a vacancy had occurred by resignation; and where such an act is shown to have been performed by him, it may be equivalent to, and conclusive of, an acceptance of the resignation.

"In this instance he issued a commission to Weaver to hold the office

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'until the qualification of his successor, who may be chosen at the ensuing general election' * * *. The commission in this case was such as should have been issued only in case of a vacancy, and is in accordance with the law governing the filling of vacancies * * *."

The Supreme Court, therefore, did not say that it was necessary for the Governor to accept a resignation in order for it to be effective, since under the facts in that case the Governor did an act which would have been inconsistent with the theory that he had not accepted the resignation of the office holder. This case is therefore not wholly in point with the question under consideration.

I have turned to the general law upon the subject as decided by other courts that had considered a like situation and I find that the Supreme Court of the United States in the case of *Edwards v. U. S.*, 103 U. S. 471, 26 L. ed. 314, said:

"As civil officers are appointed for the purpose of exercising the functions and carrying on the operations of government, and maintaining public order, a political organization would seem to be imperfect which should allow the depositaries of its power to throw off their responsibilities at their own pleasure. This certainly was not the doctrine of the common law. In England a person elected to a municipal office was obliged to accept it and perform its duties, and he subjected himself to a penalty by refusal. An office was regarded as a burden which the appointee was bound, in the interest of the community and of good government, to bear. And from this it followed of course that, after an office was conferred and assumed, it could not be laid down without the consent of the appointing power. This was required in order that the public interests might suffer no inconvenience for the want of public servants to execute the laws. And in view of the manifest spirit and intent of the laws above cited, it seems to us apparent that the common-law requirement—namely, that a resignation must be accepted before it can be regarded as complete—was not intended to be abrogated. To hold it to be abrogated would enable every office-holder to throw off his official character at will, and leave the community unprotected. We do not think that this was the intent of the law."

The reason given in this case is so clear and logical and since it emanates from such high authority, I feel I should follow the same. Your question is accordingly answered in the affirmative, i. e., that you are authorized to perform the duties incident to your office until your resignation shall have been accepted by the Governor.

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December 3, 1940—O-1000.

WORKMEN'S COMPENSATION ACT—DUPREE ESTATE—STATUS
OF EMPLOYEES OR ATTENDANTS ENGAGED IN
CONDUCTING FOR PUBLIC USE*Gentlemen:*

From the correspondence received from you under date of November 21, 1940, it appears that J. W. Dupree owns a scenic country estate. He intends to open the grounds and buildings to the public, charging admission fee, and to operate the enterprise in much the same manner as Cypress Gardens is operated. There will be employed five or six attendants to keep up the grounds and buildings and also to show the place to the public. Your query is: Would this employment come within the scope of our Workmen's Compensation Act?

Section 2 of Chapter 18413, Acts of 1937 insofar as the same is here pertinent, provides that

"The term 'employment' includes * * * all private employments in which three or more employees are regularly employed in the same business or establishment, except * * * , agricultural and horticultural farm labor, * * * ; which is hereby defined as including * * * all labor employed in the production and handling of agricultural and horticultural products in their natural or fresh state and whether the same be engaged in picking, gathering, harvesting, processing, packing, canning or handling thereof, or in the hauling of same from the grove or field to the packing house or cannery."

In construing this statute, the words used must be given their ordinary meaning.

It is my opinion that the phrase "agricultural and horticultural farm labor" would include all laborers employed by Dupree to grow and cultivate the plants, trees, grasses and shrubs located on this estate. *Hill v. Georgia Casualty Co.*, 45 S. W. (2d) 566. However, I am of the opinion that the attendants employed to conduct the public through the grounds, clean up the premises in preparation for future public visitors, or any other type of work not directly related to or forming component part of the production or handling of agricultural or horticultural products, are not included in the exception set out in Section 2 of Chapter 18413, Acts of 1937.

December 3, 1940—O-1001.

WORKMEN'S COMPENSATION ACT—LANDSCAPING AS
HORTICULTURAL FARM LABOR EXEMPT*Gentlemen:*

In your letter of November 21, 1940, you state that one Harry Earle is engaged in the business of landscaping. You request my opinion as to

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whether or not one engaged in the business of landscaping is exempt from the provisions of the Workmen's Compensation Act.

Section 2 of Chapter 18413, Acts of 1937, defines "employment" as all private employments in which three or more employees are regularly employed in the same business or establishment except "agricultural and horticultural farm labor." The exception is further defined as including "all labor employed in the production and *handling* of agricultural and horticultural products."

In determining whether or not landscaping is horticultural farm labor, it is necessary to ascertain the exact meaning of the word "horticulture." This term may be defined as "the cultivation of a garden or orchard, the science and art of growing fruits, vegetables and *flowers or ornamental plants.*" *Webster's New International Dictionary.*

I am of the opinion, therefore, that the business of landscaping, insofar as it involves the actual growing or handling of plants, trees, shrubs, flowers or grasses, is a form of horticultural farm labor, and, therefore, exempt from the provisions of the Act.

December 3, 1940—O-1002.

UNEMPLOYMENT COMPENSATION LAW—TURPENTINE
FARMERS AND NAVAL STORES OPERATORS ARE
AGRICULTURAL LABOR AND NOT ENTITLED
TO BENEFITS UNDER LAW

Gentlemen:

This is in reply to your letter of November 19, 1940, in which you ask to be advised as to whether or not under the provisions of the Florida Unemployment Compensation Law, turpentine farmers and naval stores operators who paid Unemployment Compensation contributions, are entitled to a refund thereof under the provisions of Section 15 F of that Act. You also ask to be advised as to whether or not workers so employed, are entitled to Unemployment Compensation benefits.

Since wages paid for "employment" is the basis for (1) contributions by the employer and (2) benefits to the employee, the answer to both questions depends upon whether or not turpentine farming and naval stores operations constitute "employment" within the meaning of the Florida Unemployment Compensation Law. Agricultural labor is not "employment" as defined in the Florida Unemployment Compensation Act. See Section 3 VI (a) thereof.

In the case of *United States v. Turner Turpentine Company*, 111 Fed. (2) 400, the Circuit Court of Appeals for the Fifth Circuit held that labor the Circuit Court of Appeals for the Fifth Circuit held that labor performed in the production of gum from oleoresin by a scarification of living pine trees and its processing into gum, spirits of turpentine and gum resin was "agri-

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cultural labor" within the meaning of the Federal Social Security Act, and hence was exempt from the taxing provisions thereof.

Section 3 VI (i) of the Florida Unemployment Compensation law provides that the term "employment" shall not include "any employer, employment, or service which is not included within the operation of Title IX of the Federal Social Security Act, or amendments thereto."

The labor described in the aforementioned case was held not to be within the operation of Section IX of the Federal Act. Therefore, by reason of Section 3 VI (i), such labor is not within the operation of the Florida Unemployment Compensation law. I am, therefore, of the opinion that the Florida Act does not require contributions to be made by the employer of such labor, and that refunds thereof may be made pursuant to the provisions of Section 15 F. I am also of the opinion that workers performing such labor, are not entitled to benefits under the provisions of the Florida Act.

December 4, 1940—O-1006.

WORKMEN'S COMPENSATION ACT—INDEPENDENT CONTRACTORS—EMPLOYEES—BOOTBLACKS

Dear Sir:

This is in reply to your request for an opinion in which you state:

"The owner of a barber shop, wherein three barbers are employed by the owner, also allows a bootblack to operate exclusively in his shop. The bootblack buys all of his materials such as shoe polish, shine rags, etc. The bootblack receives his compensation for the work performed from the patrons of the shop who hires him to shine their shoes, and the owner of the shop furnishes the bootblack's shoe shine stand or chair without cost to the bootblack. However, the bootblack must perform the services ordinarily performed by a porter for the right to operate within the barber shop, that is, he must sweep the floor, keep the barber shop clean, remove the aprons from the patrons, and do other chores as directed by the owner of the shop. The bootblack must perform services for all patrons of the shop at their request. He is also under the direction and control of the owner of the shop as to the hours he must be available to perform such services."

Section 2 (2) of the Florida Workmen's Compensation Act provides as follows:

"The term 'employee' means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also including minors whether lawfully or unlawfully employed, but excluding independent contractors and excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer."

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I am of the opinion that the bootblack is an employee of the barber shop within the meaning of the Workmen's Compensation Act. See my opinion dated November 3, 1939, holding golf caddies paid by the players to be employees of the Golf Club.

SECTION 26

State Officers — Florida Securities Commission

January 23, 1939—O-12.

SECURITIES—WHEN PROOF OF EXEMPTION REQUIRED

Gentlemen:

You call my attention to Sections 3 and 4 of Chapter 17253, Laws of Florida, Acts of 1935, which enumerate and define certain securities and transactions exempt from the provisions of the Florida Securities Act. You request my opinion as to whether the Commission has authority to require all issuers taking advantage of such exemptions to first prove such exemptions by filing a petition with the Commission setting forth the facts showing petitioner entitled to the exemptions claimed.

In the absence of any such specific requirement contained in the statute and in the further absence of any provisions authorizing the Commission to adopt rules and regulations in respect to this subject, it is my opinion that the Commission cannot prescribe such a requirement. Section 13 of Chapter 14899, Laws of Florida, Acts of 1931 relates only to the burden of proof in certain proceedings therein referred to and would not support the action proposed to be taken by the Commission with regard to proving exemptions.

April 11, 1939—O-146.

SECURITIES—ISSUER EXEMPT FROM REGISTRATION NOT
REQUIRED TO QUALIFY AS DEALER*Gentlemen:*

This is in reply to your letter of April 3 in which you request my opinion as to whether or not the issuer of a security that is exempt from registration by the provisions of Section 3, Chapter 17253, Laws of Florida, Acts of 1935, who is selling such security, is a dealer under the provisions of Section 6 of that Act, and as such required to register.

I call your attention to the following provision contained in Section 6 of the above named Act:

"Any issuer of a security required to be registered under the provisions of this Act, selling such securities except in exempt transactions as defined in Section 5 hereof, shall be deemed a dealer within the meaning of this Section 11 and required to comply with all the provisions hereof." (Italics ours.)

The statutory provision above set forth would enlarge the definition of a "dealer" appearing in subsection (4) of Section 1 of said Chapter 17253 so as to include the issuer of securities required to be registered under the provisions of the Uniform Sale of Securities Act, who sells said securities on his own behalf in transactions other than those specifically defined to be

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"exempt transactions" under the Act. In determining whether an issuer must register as a "dealer" we apply the following tests:

1. Are the securities which he issues subject to registration?
2. Are the transactions in which the securities are sold "exempt transactions" as defined in the Act?

If the answer to the first question is in the affirmative and the second question in the negative the issuer must register as a "dealer." If either the answer to the first question is in the negative or the second question the affirmative, the issuer is not required to qualify as a "dealer."

August 4, 1939—O-412.

**SECURITIES—LAND RENTAL AGREEMENT PROVIDING FOR
MANAGEMENT AND DIVISION OF NET PROFITS
AS CONSTITUTING "SECURITY"**

Gentlemen:

You submit for my consideration a copy of a rental contract relating to land located in Cuba.

Under the terms of the contract, the investor pays a designated amount as rental for specifically described lots. Eighty per cent of the amount so paid is to be placed in a fund to be used exclusively for the development of the lots so rented and other lots in the tract. The particular lots may be developed separately or together with other lands and the proceeds pooled. The investor receives one-half of the net income and the company managing the properties receives the other one-half.

This rental agreement is essentially different from an ordinary agreement to rent property, such as we find in the course of usual business transactions. The substance of the contract is that it is to be an investment. The investor rents the land not because he has any idea of living on it, but because he has expectation of receiving a profit therefrom by reason of the management of the property under the terms of the contract.

The contract under consideration does not differ fundamentally from those considered in the cases of *Kerst v. Nelson*, 213 N. W. 904, 54 A. L. R. 495, and *State v. Agey*, 88 S. E. 826.

Insofar as the provisions relating to management and sharing of profits are concerned, they do not differ essentially from the "partnership profit-sharing agreement" and "guaranteed re-sale lease agreement" which were determined to be securities by the Supreme Court of Florida, in the case of *Ryan v. State*, 174 So. 138.

It is my opinion that the contract which you submitted is a security within the definition contained in Section 1 of Chapter 19190, Laws of Florida, Acts of 1939, being an "investment contract, or beneficial interest in title to property, profits or earnings, interest in or under a profit-sharing or partici-

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pation agreement or scheme." To be eligible for sale in Florida, such contracts must be registered with the Florida Securities Commission pursuant to the provision of the Uniform Sale of Securities Act.

December 12, 1939—O-673.

UNIFORM SALE—TRANSACTION CONSTITUTING SECURITY

Gentlemen:

You jointly request my opinion with regard to the following problem:

"A," a dealer in ice-cream machines, approaches "B," an individual who has or can get \$721.00 or any multiple thereof, and sells to "B" one or more ice-cream manufacturing machines for \$721.00. "B" has no use for a machine and "A" agrees to place the same in a drug store or candy store owned by "C" at no cost to "C." "C" enters into a contract with "D," a dairy company, and out of each \$1.00 paid by "C" to "D" for ice-cream mix, "D" remits 35 cents to "B."

It is my opinion that the transaction above set forth would constitute the sale of a "security" within the definition set forth in Section 1 of the Uniform Sale of Securities Act, as amended. This would not be simply the sale of an ice cream manufacturing machine. It would be the sale of such a machine in connection with an additional agreement on the part of the vendor concerning the use thereof, which may result in profit to the purchaser. From a practical standpoint, it would be simply the investment of \$721.00 in an enterprise.

The contract on the part of "A" to place the ice cream manufacturing machine in a drug store or candy store, with part of the proceeds paid for ice cream mix to be remitted to the purchaser of the machine is an "investment contract" and therefore a "security" under the provisions of our law.

January 23, 1939—O-11.

FEES—ALLOWANCE ON CREDIT

Gentlemen:

This is in reply to your letter of January 20. You state that in the past it has been the policy of the Florida Securities Commission to make no refund of fees paid on filing an application for registration of securities when such registration is denied or the application dismissed, but in instances where the Commission issues a permit for less than the amount requested the Commission has allowed the applicant a credit to be applied on any subsequent application that might be filed by the applicant. For example, if an applicant should apply for permission to sell \$100,000 worth of securities and should pay his fees based on that amount and the Securities Commission should permit him to file only \$50,000 worth, he would have a credit to be applied toward any future application to the extent of the fees paid based on

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the \$50,000 worth of securities not authorized to be issued in the first instance.

So long as the credit is allowed only on the identical issue of securities for which application was originally made the subsequent application could logically be construed as coming within the scope of the original application. For that reason the practice of allowing such credits in such restricted instances would in my opinion be proper.

April 17, 1940—O-784.

**SECURITIES—CONSTRUCTION OF LAW RE: DEPOSIT TO
QUALIFY AS DEALER—WITHDRAWAL**

Gentlemen:

You request my opinion with regard to substantially the following facts:

A dealer in municipal securities has heretofore qualified as such, pursuant to Section 3 of Chapter 16174, Acts of 1933, as amended by Section 9, Chapter 17253, Acts of 1935, by depositing with the Florida Securities Commission securities to the value of \$2500.00. This dealer now desires to substitute for said deposit a personal surety bond as permitted under the provisions of that section. The dealer desires to immediately withdraw the securities so deposited, and insists that he cannot be required to leave the securities on deposit for a period of one year as prescribed in Section 2 of Chapter 16174, Acts of 1933.

The purpose of Section 3 is to reduce the amount of the bond to be required of dealers in municipal securities to \$2500.00 and to permit the filing of a personal bond for that amount, in lieu of a deposit of securities, cash, or a surety bond. The provisions of Section 2, requiring securities to remain on deposit for a period of one year after the expiration of the term for which the deposit was made, apply to the deposit of securities made pursuant to Section 3. It therefore follows that the Florida Securities Commission has a right to retain such a deposit of securities for a one-year period.

This would not result in requiring both a deposit of securities and a surety bond *covering the same period*. The liability under a surety bond would be only for the current license period and the liability of the deposit would be only for the preceding license period.

It is my opinion, however, that the Florida Securities Commission has the discretion to authorize the substitution of a surety bond, either personal or one executed by a surety company, for securities on deposit, so long as the bond on its face discloses the liability of principal and sureties for the license period for which the deposit of securities was originally made. In exercising this discretion, however, the Florida Securities Commission should take every reasonable precaution to see that the rights of the public are protected. If, for instance, it appears that claims have been or will be asserted against the deposit, the Florida Securities Commission would hardly be justified in permitting a bond to be substituted for a deposit of marketable securities

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unless payment can be enforced under that bond as readily as it could be enforced against the deposit of securities.

October 18, 1940—O-958.

UNIFORM SALE OF SECURITIES ACT—WITHDRAWAL OF
SECURITIES DEPOSITED IN ESCROW UNDER SEC-
TION 14 FOR CANCELLATION TO REDUCE
IMPAIRMENT OF CAPITAL STOCK

Gentlemen:

You call my attention to substantially the following facts: Registration by qualification was effected with regard to 2500 shares of a certain corporation. Under Section 14 of the Uniform Sale of Securities Act, 750 shares which have been issued to the president of the corporation as consideration for an assignment by him to the corporation of a sales agreement, were deposited in escrow. In order to overcome an impairment of the capital stock, the president now requests the Commission to allow him to withdraw the 750 shares so that they may be cancelled and the outstanding capital stock be reduced by that amount. Such stock will not be reissued without the consent of the Commission and not until such time as all other stockholders who have paid for the stock in cash shall have been paid from earnings dividends aggregating not less than 6%. Such stock will not be reissued, in any event, unless the surplus of the company will warrant such reissuance. You request my opinion with regard to whether the stock may be so withdrawn for cancellation.

The purpose of Section 14 was to prevent those who obtained their stock in exchange for intangible assets from sharing on an equal basis with those who had purchased their stock with cash, until such time as the business enterprise has begun to make substantial profits. There is nothing in Section 14 which would prevent the withdrawal of stock from escrow for the sole purpose of cancelling same.

November 19, 1940—O-986.

UNIFORM SALE OF SECURITIES ACT—PAYMENT OF FULL COM-
MISSION AUTHORIZED IN TRANSACTION FOR PURCHASE
OF STOCK WHEN PART PAID IN CASH AND BAL-
ANCE EVIDENCED BY PROMISSORY NOTE

Gentlemen:

In your letter of November 13 you state that an issuer of certain securities has followed the practice, in some instances, of receiving payment for said securities partly in cash, with the balance due evidenced by a promissory note, the stock purchased being pledged as security for the note. You request my opinion as to whether such transactions are closed transactions

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so as to authorize the payment of full commission to dealers in connection with the sale of such stock. This inquiry is pertinent to the enforcement of provisions of the Uniform Sale of Securities Act prohibiting the payment of excess commissions.

It is my opinion that such transactions are closed transactions. Title to the stock passes to the purchaser and the fact that the consideration for said stock was paid partly by a promissory note, secured by the stock itself, is merely incidental. The situation would be different if title to the stock did not pass to the purchaser until payment in full had been made.

SECTION 27

**State Officers — Florida State Board of Dental
Examiners**

November 19, 1940—O-987.

**FLORIDA STATE BOARD OF DENTAL EXAMINERS AUTHORIZED
TO SUSPEND LICENSES***Gentlemen:*

You call my attention to Section 20 of Chapter 14708, Laws of Florida, Acts of 1931. You request my opinion as to whether the Florida State Board of Dental Examiners has authority to suspend, rather than revoke, the licenses of individuals whose licenses are subject to revocation for the reasons set forth in Section 18 of said statute, as amended by Chapter 16970, Acts of 1935.

Section 20 of Chapter 14708 reads as follows:

"Section 20. If, at such hearing of the accused, the Board shall be satisfied that the accused has been guilty of any offense charged in the accusation, it shall thereupon, without further notice revoke the license of the person so accused. The Board shall have power in proper cases to authorize the payment of fees and traveling expenses of necessary witnesses required to appear before the Board and actually examined in any proceeding properly before it. Upon revocation of any license, the fact shall be noted upon the records of the Board and the license shall be cancelled upon the date of its revocation. Written notice of such *suspension*, revocation or cancellation shall be mailed by the Secretary-Treasurer of the Board to the Clerk of the Circuit Court in each county in which such license is then registered or should have been registered under any of the provisions of this Act, and said Clerk shall record such notice." (Italics ours.)

It is my opinion that the use of the word "suspension" in Section 20 of the statute indicates legislative intent that the Board should have the right to suspend licenses on the grounds set forth in Section 18. It may be that in some cases there would be mitigating circumstances which would induce the Board to suspend rather than revoke licenses.

SECTION 28

State Officers — Florida State Hospital

August 1, 1939—O-505.

NON-RESIDENTS NOT ELIGIBLE FOR HOSPITALIZATION

Dear Sir:

This will acknowledge receipt of your letter of July 29 in which you state:

"Inasmuch as he has been away from the State since September, 1936, and in New York, where he became involved as indicated in report, the question as to whether or not we are legally responsible for his hospitalization is before us."

In reply I wish to advise that this is not now an open question in the State of Florida because our recent 1939 Legislature passed Chapter 19163, Section 9 of which provides:

"No person shall be committed to or received as a patient for treatment in the Florida State Hospital, who has not been a bona fide resident of the State of Florida continuously for one year immediately preceding the examination of said person under the provisions of Section 2309 of the Revised General Statutes of Florida."

The language of this section leaves no room for interpretation and I can only advise you that the person referred to is not eligible for hospitalization in your institution.

August 30, 1939—O-559.

FLORIDA STATE HOSPITAL NOT LIABLE UNDER WORKMEN'S
COMPENSATION ACT—EMPLOYEE IN FARM DEPART-
MENT KILLED BY LIGHTNING—HOSPITAL
NOT LIABLE

Dear Sir:

This will acknowledge receipt today of a copy of a letter addressed to you from Dr. Therrell reporting an accident on the afternoon of August 24 at approximately 3:20 P. M., wherein Mr. W. H. Sumner, truck driver in the Farm Department, while leaning against a tree was killed by lightning; also, Exhibits A and B attached to said letter.

My opinion is requested as to whether or not this accident should be covered by the Workmen's Compensation Act, and whether or not the Hospital would be liable under such Act or whether it would be construed under given circumstances as an act of God.

In reply I wish to advise that the Workmen's Compensation Act as amended provides:

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"The term 'employment' includes employment by the State and all political subdivisions thereof, except officers elected at the polls, and all public and quasipublic corporations therein and all private employments in which three or more employees are regularly employed in the same business or establishment, except domestic service in private homes, *agricultural and horticultural farm labor*. * * *"

This Act could be construed as excluding employment by the State and all political subdivisions thereof when the employee was engaged in agricultural and horticultural farm labor. In this connection I call your attention to a fairly recent case of *Webb v. Stokely Brothers & Co., Inc.*, decided by the Supreme Court of Tennessee on February 18, 1939, where the Court said:

"The defendant company, which is engaged in operating a cannery in the town of Sevierville, operates a farm in connection therewith. Petitioner was employed by defendant to work on this farm, on which vegetables were raised to supply the cannery. On September 1, 1937, petitioner was engaged in pulling corn and throwing it into a wagon. While he was on the back end of this wagon, he was thrown to the ground by the unexpected starting of the team, and sustained injuries.

"It is held that petitioner was engaged in agriculture and, therefore, is not entitled to compensation. The fact that his employer was engaged in another business, in which the products of the farm were utilized, could not change petitioner's status from that of farm hand to that of an employee of the cannery. Judgment, dismissing the petition, affirmed."

There is still another question involved and that is whether or not compensation is allowed when lightning caused the death of an employee. In that connection I call your attention to a case decided on August 10, 1939, by the Court of Appeals of Missouri, of *Felden, et al., v. Horton & Coleman, Inc., et al.*, wherein the Court said:

Claim was made for compensation for the death of Felden by lightning. The Commission denied compensation, but the circuit court reversed the Commission. The employer and insurer have appealed.

"Felden was in the employment of Horton & Coleman, Inc., who were engaged in repairing a levee on the Mississippi River which had been broken by a flood. At the break the water was pumped back into the river by a gasoline engine operated by Felden. As long as the pump was going he could follow his inclinations in moving around in that vicinity.

"This court is unable to find any special or peculiar danger from lightning to which Felden was exposed from attending the engine and obtaining gasoline for it. It was not shown that lightning was a risk peculiarly incident to his employment. Major Peebles, a consulting electrical engineer, gave it as his expert opinion that when on the levee Felden would incur substantially the same risk of being struck by lightning as he would if elsewhere in the community; that the height of the levee (17 feet) did not create a hazard because the slopes were covered by growing vegetation which went

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higher than the crown of the levee; and that Felden was not killed by a direct stroke of lightning but by an induced current. Major Peebles testified that in Mississippi County, Missouri, over 60% of the gainfully employed were engaged in agriculture, and that these people spent about 98% of their employment time in the open. It was his opinion that Felden's employment and his presence on the levee was a hazard no greater than that of any one else in an open field.

"In the Missouri cases in which lightning caused injury or death and compensation was allowed, the human element entered, and some agency of man joined with the act of God to increase the danger of the employment. When an act of God causes injury or death without the intervention of human agency, compensation is not allowed. The undisputed evidence and all favorable inferences to be drawn therefrom indicate that Felden was killed in the course of his employment by an act of God without the intervention of human agency. Therefore, the order of the Commission, denying compensation, should not have been disturbed. The judgment of the circuit court is reversed."

I have also examined the general law with reference to this subject and quote from 71 C. J., Workmen's Compensation, page 758, paragraph 472, under the general head of lightning:

"Harm resulting from lightning may be comparable as an injury arising out of and in the course of the employment, where the injured employee is by reason of his employment peculiarly exposed to risk of injury from this source; but where the employment does not expose an employee to the risk of injury from lightning in a greater degree than usual, harm resulting from being struck by lightning may not be compensable."

See Note 44 for many other cases.

When I apply the above authorities and the reasoning therein to the facts of the instant case, I am unable to say that Mr. Sumner by reason of his employment was peculiarly exposed to risk of injury from lightning as I am of the opinion that his employment did not expose him to the risk of injury from lightning in any greater degree than usual.

I am, therefore, of the opinion that the Hospital would not be liable under the Workmen's Compensation Act because of the reasons expressed herein.

May I suggest that Dr. Therrell immediately secure several pictures of the scene of the accident and note on the same the time and place and the person who took the pictures so they will be available in the event of a law suit. I will appreciate it very much if he will have these pictures made in duplicate and furnish this office with a set of same.

STATE OFFICERS — Florida State Hospital

September 15, 1939—O-569.

ADMISSION OF PATIENTS—NONRESIDENTS NOT AUTHORIZED
BY SECTION 9, CHAPTER 19163*Dear Sir:*

This will acknowledge receipt of your letter of September 14 with enclosures. You request me to give you an opinion upon the following question:

"The question now arises as to whether the party would be eligible, under Section 9, Senate Bill 136, Chapter 19163 * * * for admission here."

You state that the person involved "* * * left Florida June 25, 1939, for the purpose of making her home with relatives in Philadelphia, not as the wife of Moore."

The pertinent part of the law you refer to reads:

"Section 9. No person shall be committed to or received as a patient for treatment in the Florida State Hospital who has not been a bona fide resident of the State of Florida continuously for one year immediately preceding the examination of said person under the provisions of Section 2309 of the Revised General Statutes of Florida."

Therefore, in order to answer your question, we have only to determine whether or not under the facts submitted the person seeking admission to the Florida State Hospital has "* * * been a bona fide resident of the State of Florida continuously for one year immediately preceding the examination of said person under the provisions of Section 2309 of the Revised General Statutes of Florida."

According to your statement, this person "* * * left Florida June 25, 1939, for the purpose of making her home with relatives in Philadelphia. * * *"

Assuming your statement to be in accordance with the facts, I am of the opinion that Elva Moore ceased to be a resident of the State of Florida on June 25, 1939, and is, therefore, not eligible under Section 9, Chapter 19163, Laws of Florida, Acts of 1939 for admission to the Florida State Hospital.

This, therefore, answers your question in the negative.

SECTION 29

**State Officers — Florida Society of Sociology and
Prophylaxis**

October 18, 1940—O-959.

**FLORIDA SOCIETY OF SOCIOLOGY AND PROPHYLAXIS—
SOLICITATION OF FUNDS***Gentlemen:*

I have your letter asking whether there is any action which could be taken to stop the solicitation of funds by a person using the title of Doctor, and calling himself State Field Director of the Florida Society of Sociology and Prophylaxis.

I find no general law regulating the solicitation of funds, such as the ordinances in force in many cities and towns. However, the use of the word "Doctor" or any abbreviation thereof in such connection as would tend to imply that the user is a practitioner of medicine, may be prevented if the person is not licensed under Florida law to practice medicine, Section 7, Chapter 12285, Acts of 1927 (Section 7704, C. G. L.). This would not prevent such person from solicitation of funds for his Society, but would stop him from leading people to believe he is a doctor of medicine and therefore supposed to have a professional knowledge of his subject matter.

The Legislature has given to you the power to provide for the publication and distribution of information about the prevention of diseases, and any person who interferes with or hinders, or opposes any officer, agent or member of your Board in the performance of his duty as such under this Act shall be guilty of a misdemeanor, Chapter 19366, Sections 7, 11, Acts of 1939, and has also given you power over venereal diseases, Section 9, Chapter 7829, Acts of 1919 (Section 3953 C. G. L.). Any person who violates any of such rules and regulations made by you is guilty of a misdemeanor and punishable accordingly. Section 5, Chapter 7829 (Section 7736 C. G. L.).

SECTION 30

State Officers — Forestry Department

June 2, 1939—O-366.

AGENTS NOT AUTHORIZED TO SERVE WARRANTS AND OTHER
PROCESS OF THE COURTS IN ENFORCEMENT OF LAWS*Dear Sir:*

In your letter of May 24, 1939, you refer to an Act of the Legislature which vests in the Conservation Agents authority to serve warrants and other process of the courts in the enforcement of all laws relating to conservation under the State Board of Conservation. You state that the principle involved is of interest to you and your Board for the reason that on numerous occasions, people interested in enforcing the forest fire laws have advocated that the district forester, rangers, and wardens engaged in the prevention and suppression of fires be given police power. You thereupon request my opinion in respect to the legality of fire wardens and other employees of your Department being granted such police powers.

As stated in your letter you are employed by the Florida Board of Forestry, and this is also true as to forest rangers and fire wardens and other employees of the Board. The statute makes it your duty to take such action as is authorized by law and by the Florida Board of Forestry, to prevent and extinguish forest fires and enforce all laws pertaining to forest fires and woodlands, and to cause prosecution for any violation of said laws; but the Legislature has not by statute authorized you to make arrests or to execute warrants or other process of the Court for violation of the fire protection laws, and this is also true of the forest rangers and fire wardens and other employees of your Department.

In other words, while the law makes it your duty to cause prosecutions for any violation of the forest fire laws, the arrest of persons for such violations cannot lawfully be made by you or the forest rangers or fire wardens or other employees of the Florida Board of Forestry.

SECTION 31

State Officers—Game and Fresh Water Fish Commission

June 27, 1939—O-396.

DEER—LAWS RELATING TO OPEN HUNTING SEASON IN NASSAU COUNTY—CHAPTER 18715, ACTS OF 1937— CHAPTER 19996, ACTS OF 1939

Dear Sir:

This is in reply to your letter of June 26th. You call my attention to the provisions of Chapter 18715, Laws of Florida, Acts of 1937.

In view of the provisions of said Chapter 18715, you request my opinion as to what is meant by the words, "the regular open hunting season" for taking deer in Nassau County, set forth in Section 1 of said Senate Bill 1189.

To begin with, under the general law, the open season for taking deer, buck only, is from November 20 to December 31, of each year. See Section 43 of Chapter 13644, Laws of Florida, Acts of 1929. Insofar as Nassau County is concerned, the general law was superseded by Chapter 18715, Acts of 1937, Section 1 of which reads as follows:

"Section 1. That the open season on hunting and killing of buck deer in Nassau County, Florida, shall be on Tuesdays and Wednesdays of each week, beginning the 15th day of June, A. D. 1937, and ending on the 1st day of August, each year for a period of five (5) years."

At the 1939 session of the Legislature, Senate Bill 1189 was enacted, Section 1 of which reads as follows:

"Section 1. That it shall be unlawful for any person to hunt or take deer in Nassau County, Florida, except on Tuesday and Thursday of each week during the *regular open hunting season*." (Italics ours.)

The question now presented is whether the words "regular open hunting season" relate to the season as defined in Section 43 of Chapter 13644, Acts of 1929, or Section 1 of Chapter 18715, Acts of 1937. A careful consideration of the language used by the Legislature compels the conclusion that the words "regular open hunting season" apply to the regular open hunting season prescribed by the general law, Section 43 of Chapter 13644, Acts of 1929.

It is obvious that the language of the 1939 Act could not apply to the season defined in the 1937 Act, because the season so defined " * * * shall be on Tuesdays and Wednesdays of each week, beginning the 15th day of June * * *." It is to be noted that the 1937 statute did not prescribe that the open season shall be that period beginning the 15th day of June and ending the first day of August. It provided that the open season shall be " * * * on Tuesdays and Wednesdays * * *." It is obvious that the 1939

STATE OFFICERS — Game and Fresh Water Fish Commission

Act could not apply to the season as defined in the 1937 Act, because it would be impossible to permit hunting on Tuesdays and Thursdays of each week in a season which consists only of Tuesdays and Wednesdays.

October 30, 1939—O-623.

UNLAWFUL TO FISH WITH NETS IN HOMOSASSA RIVER

Dear Sir:

I am in receipt of your letter of the 28th, in which you ask my opinion as to whether or not it is lawful to use nets in the tributaries of the Homosassa River above or upstream from where the Salt River enters said river.

Chapter 19773, Acts of 1939, provides in part as follows:

"That from and after the passage of this Act, it shall be unlawful for any person, persons or corporation to place or set nets, or to take fish by the use of nets, or in any way or manner except by rod and reel; pole, hook and line, from the waters of Homosassa River in Citrus County, Florida."

Chapter 15123, Acts of 1931, provides in part as follows:

"It is unlawful to fish in or take fish from the waters of Homosassa River, and its tributaries, in Citrus County, Florida, above or up-stream from where the Salt River enters, connects with or crosses said Homosassa River at or near where the western boundary line of Township 19 South, Range 17 East, crosses said Homosassa River, except by hook and line, rod and reel, and spear, gig, or grain, and at lawful periods."

It seems to me that the 1931 law is still in full force and effect except so far as the 1939 Act prevented the use of spear gig or grain in catching fish, and that, therefore, it is still unlawful to use nets to catch fish in any of the tributaries of the Homosassa River, above or upstream from where the Salt River enters, connects with, or crosses Homosassa River at or near where the Western boundary line of Township 19 South, Range 17 East, crosses said Homosassa River.

March 25, 1940—O-768.

ALLIGATORS—CONSTRUCTION OF CHAPTER 19706, SPECIAL ACTS OF 1939

Dear Sir:

You request my opinion as to whether the provisions of Chapter 19706, Special Acts of 1939, prohibit dealers representing out of State concerns from accepting deposits on alligators which are sent by said concerns directly to the consumer from a point outside of Broward County.

Section 1 of Chapter 19706 makes it "unlawful for any person to capture, injure, or kill any alligators within the territorial limits of Broward

STATE OFFICERS — Game and Fresh Water Fish Commission

County, Florida," except as therein provided. Section 2 of said Act, makes it "unlawful for any person to offer for sale, sell, transport, or transport for sale, any alligators, alligator skins, alligator teeth, or alligator goods, within the territorial limits of Broward County, Florida," except as therein provided.

Chapter 19706 is a conservation measure enacted for the purpose of protecting the alligators in *Broward County*. Section 2 of the Act provides the means by which the legislative intent is to be accomplished. Section 2, therefore, must be construed in the light of the obvious legislative intent. It would therefore follow that Section 2 of the Act was intended to apply only to the sale, offering for sale, transporting, or transporting for sale, of alligators captured or killed within the territorial limits of Broward County, Florida. This statute would not, therefore, prohibit dealers representing out of State concerns from accepting deposits within Broward County on alligators which are sold by said out of State concerns, but which alligators do not originate in Broward County.

August 7, 1940—O-891.

GAME—POSSESSION OF DURING CLOSED SEASON

Dear Sir:

You request my opinion with regard to whether in a prosecution for violating Section 46 of Chapter 13644 (Sec. 1977 [46] Compiled General Laws, Permanent Supplement) it is necessary to prove that the game was not only possessed but was taken in the county in which the prosecution was instituted.

Section 46 of Chapter 13644, reads in part, as follows:

"Section 46. Possession of Game During Closed Season Prohibited.—It shall be unlawful to take *or* be in possession of game during closed season, except that game lawfully taken during open season may be possessed not more than five days after close of such open season unless otherwise permitted by this Act." (Italics ours.)

It is my opinion that Section 46 defines two separate and distinct unlawful acts, to-wit, first, taking game during a closed season, and second, possessing game during a closed season more than five days after the close of the open season. This being so, it is sufficient to charge one violation or the other. If a defendant is charged with unlawful possession of game, it would not seem that proof would have to be offered with regard to where or when the game was taken. It would not be incumbent upon prosecuting officers to prove that the game was not taken in a nearby county having an open season. Assuming that this would be a sufficient defense to a charge of unlawful possession of game in a county not having an open season, the defendant would have the burden of proving that defense.

STATE OFFICERS — Game and Fresh Water Fish Commission

October 26, 1940—O-970.

**EMPLOYMENT OF CONSERVATION OFFICERS UNDER SECTION
3 of CHAPTER 13644, ACTS OF 1929, AS AMENDED
BY CHAPTER 17016, ACTS OF 1935***Gentlemen:*

This is in reply to your letter of October 24, in which you request my opinion as to whether a member of the Commission of Game and Fresh Water Fish, who has been appointed by the Governor from a particular Congressional District as required under Section 2 of Chapter 13644, Laws of Florida, Acts of 1929, as amended by Chapter 17016, Laws of Florida, Acts of 1935, has the authority to employ and release a conservation officer in his district.

It is my opinion that under the provisions of Section 3 of Chapter 13644, as amended by Chapter 17016, the appointment and release of conservation officers is a matter of determination by the Commission, as such, and not by individual Commissioners. There is nothing in the law, however, to prevent individual Commissioners from recommending the appointment and release of conservation officers in their particular districts, but only the Commission has the authority to actually appoint and release such conservation officers.

SECTION 32

State Officers — Geologist

August 7, 1939—O-523.

REMOVAL OF COLLECTION OF SPECIMENS OF THE GEOLOGICAL SURVEY FROM TALLAHASSEE TO THE UNIVERSITY OF FLORIDA AT GAINESVILLE NOT ALLOWED

Dear Sir:

In reply to your oral request that I advise you with reference to this matter. I am writing you as follows:

By Section 1 of Chapter 5681, Acts of 1907, which is now Section 3846, Compiled General Laws of Florida, 1927, the Governor was required to appoint a suitable person to conduct a geological survey of the State, said person to be known as the State Geologist, and he was required to have his office at the Capitol. By Section 4 of the Act, which is now Section 3849, Compiled General Laws of Florida, 1927, it was made the duty of the State Geologist to make collections of specimens illustrating the geological and mineral features of the State; "one suit of which shall be deposited in the office of the State Geologist, at Tallahassee, and duplicate suits in the libraries of each of the State Colleges; * * *."

By Chapter 16178, Laws of Florida, Acts of 1933, a State Board of Conservation was created and all duties, powers and authority vested in the State Geologist, the Shell Fish Commissioner and the State Game Commissioner, at the time of the passage of said Act, was vested in the said Board of Conservation, except the power of appointing and employing such help, assistants and agents, as therein provided for, and the Department of State Geologist was thereby abolished. There is, however, nothing in said Act creating the State Board of Conservation (or any later Act), authorizing the collection of specimens illustrating the geological and mineral features of the State to be removed from or kept at any place other than in the office of the State Geologist at Tallahassee, as required by the 1907 Act.

I am advised that it is necessary to have this collection of specimens at the office where the Geological Survey is conducted, and there is nothing in the 1933 Act, or any subsequent Act, authorizing the removal from the Capital of such office. It is my opinion, therefore, that the said collection of specimens illustrating the geological and mineral features cannot legally be removed from Tallahassee to the University of Florida, at Gainesville, or any other place without an Act of the Legislature authorizing such removal.

SECTION 33

State Officers — Live Stock Sanitary Board

May 3, 1939—O-173.

CONSTRUCTION CHAPTER 19006, RE: PURCHASE AND
DISTRIBUTION OF ANTI-HOG CHOLERA SERUM*Dear Sir:*

I am in receipt of your letter of the 2nd, concerning Chapter 19006, and making the following inquiries about the construction of said Act:

"1. Is the making of application by a swine owner upon blanks furnished by the State Live Stock Sanitary Board, approved by the administrator of anti-hog-cholera serum and hog cholera virus, a prerequisite to being furnished free anti-hog-cholera serum and hog-cholera virus by this department, as directed by Section 2 of the Act? In other words, should this department not require the filing of such applications before shipping out the serum in order that a record of distribution may be kept?

"2. Will the Act become effective upon signature by the Governor, or becoming a law without such signature, or does the appropriation made by Section 3 of the Act become effective July 1, 1939?"

In answer to your first question, I would state that Section 2 of the Act provides as follows:

"The State Live Stock Sanitary Board shall distribute through employees of said Board, licensed veterinarians and recognized and approved agents of the State and Federal Government, anti-hog-cholera serum and hog-cholera virus without cost thereof to any owner of swine in Florida making application therefor, upon blanks to be furnished by the said Board and approved by the administrator of said anti-hog-cholera serum and hog-cholera virus."

It is my opinion that before the Board can furnish hog cholera serum an application must be made to it on the blanks furnished by the State Live Stock Sanitary Board.

In answer to your second question, Section 8 of the Act provides as follows:

"This Act shall take effect upon becoming a law."

The appropriation made in the Act is a continuing one. It is therefore my opinion that this Act will become effective upon the date of the signature of the Governor or upon its becoming a law without such signature. The effective date will, of course, be determined by the time the Governor signs the same or the time it is sent to the governor for his signature, in the event he fails to approve it.

STATE OFFICERS — Live Stock Sanitary Board

July 26, 1939—O-498.

**AUTHORITY TO SPEND APPROPRIATION AND RIGHT TO
DISTRIBUTE ANTI-HOG-CHOLERA SERUM
AND HOG-CHOLERA VIRUS***Gentlemen:*

I am in receipt of your letter of the 25th, in which you state that you have spent approximately \$50,000 of the \$125,000 appropriated for the distribution of free anti-hog-cholera serum and hog-cholera virus, but that these bills have not been paid by the State Comptroller, and asking my advice as to whether or not you should continue to purchase and distribute these products to the extent of the entire \$125,000 authorized under the appropriation for this purpose.

The law plainly provides that \$125,000 is appropriated for this purpose. The question of whether or not your department should go in debt for it is one upon which this office cannot advise you. It seems to me that this is a matter that should be taken up with the Budget Commission.

You also further inquire as to whether, if only a part of the \$125,000 is made available, you can distribute the anti-hog-cholera serum and hog-cholera virus on any other basis than 100 per cent free; that is, can you charge a certain percentage to the hog owner for these products?

In response to this inquiry, I would state that the powers of the Florida State Live Stock Sanitary Board are strictly statutory, and since the repeal of Chapter 18153, you do not have authority to distribute anti-hog-cholera serum and hog-cholera virus except without charge to the owner.

September 12, 1939—O-568.

AUTHORITY TO DISTRIBUTE HOG-CHOLERA SERUM AT COST*Dear Sir:*

I am in receipt of your letter of the 11th, in which you inform me that you have discontinued the distribution of free hog-cholera serum under Chapter 19006, at the direction of the Budget Commission, in accordance with their letter to you dated August 26, copy of which you enclose.

You stated in your letter that since the discontinuance of the free serum that your department has been urged by the swine owners of the State to distribute serum and virus at cost. You stated further that hog cholera is a highly contagious disease and unless controlled the swine owners of the State will suffer great financial loss. It also appears from your letter that your department could buy this serum and distribute it to the swine owners at less than one-half the cost at which they themselves could buy it, and you inquire as to whether or not you would have authority to purchase hog-cholera

STATE OFFICERS — Live Stock Sanitary Board

virus and serum and distribute the serum at cost to the swine owners of this State.

In reply to this question I would state that Section 3320, C. G. L., relating to your Board, provides as follows:

"Said board shall collect, preserve, and disseminate information concerning infections, contagious, communicable, or other diseases of cattle, hogs, and other domestic animals, their origin, locality, nature, appearance, manner of dissemination or contagion, and method of treatment required for the successful eradication and control thereof, and shall take such measures as in the judgment of said board may be necessary and proper for the control, suppression, eradication and prevention of the spread thereof, and to protect cattle, hogs, and other domestic animals therefrom in the State of Florida, and to quarantine all such animals as said board shall find or have reason to believe to be infested with or exposed to any such disease or diseases."

It seems to me that under this section, if in your opinion, in order to avert an epidemic of hog cholera and to prevent the spread of this disease, it is necessary that this serum be purchased, that you may purchase and distribute it at cost, provided, however, there is no liability on the State to pay for the serum.

SECTION 34

State Officers — Milk Commission

June 20, 1940—O-829.

JURISDICTION OF NEW COMMISSION

Dear Sir:

This will acknowledge receipt of a letter dated June 18 from Judge J. R. Kelly, attorney for the Milk Commission, requesting my opinion upon the following question:

"Where there was an area created under the old law by petition of a representative group of dairymen, is it necessary to file another petition with the Milk Commission to give such Commission jurisdiction in that area?"

Complying with Judge Kelly's request, I wish to advise that Chapter 19231, Acts of 1939, created the Milk Commission and repealed the former Milk Board Act. However, in the last sentence in paragraph 24 of the Act, this exception is made:

"All orders, rules and regulations of said Milk Control Board created by Chapter 18022 of the Acts of the Florida Legislature of 1937 shall continue until otherwise changed, modified or vacated by the Commission herein created."

If it required new petitions to be filed in order to set up an area in which the Milk Commission would have had jurisdiction, there would have been no necessity for the insertion of the above quoted language in the statute for the reason that the board under the previous Act had no jurisdiction unless a majority of the representative dairymen had petitioned for the establishment of an area.

In view of what I have said, it is apparent that it was the intention of the Legislature that the new Milk Commission should continue to function in place of the old Board unless the new Commission desired to do otherwise and that it was not necessary to the jurisdiction of the new Commission that new petitions be filed to create areas that had formerly existed.

July 20, 1939—O-483.

AUTHORITY TO PAY SALARIES AND BILLS OF OLD BOARD

Dear Sir:

I am in receipt of your letter of the 19th, in which you ask my opinion as to whether or not the Administrator and members of the Commission appointed under and by virtue of Chapter 19231, Laws of Florida, Acts of 1939, would be entitled to their salaries and expenses incurred from the time prior to the date they qualified as the Administrator and members of the Commission, and also inquiring as to whether or not, under Section 24 of

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Chapter 19231, the new Board would be authorized to pay the bills incurred by the old Board under Chapter 18022 from moneys received under the provisions of the new Act.

In answer to the first question, I would state that I am of the opinion that the Administrator and members of the Commission would only be entitled to their salaries and expenses from the time they qualified as such officers.

In answer to the second question, I would state that Section 24 of Chapter 19231 provides in part as follows:

"And providing further that all obligations lawfully incurred and now due or to become due prior to the effective date of this Act shall be paid out of any funds now held by the Board created under Chapter 18022 of the Acts of the Florida Legislature of 1937, and should there be insufficient funds with which to pay said obligations in full, the Commission created hereunder shall pay the same out of any funds coming into its hands either from taxes due to the old Board and collected by the Commission created hereunder or from any taxes collected under the provisions of this Act * * *."

It is my opinion that this section authorizes the payment of all bills incurred by the old Board from moneys received from Chapter 18022, but if there is not enough money from this source then the old bills could be paid from moneys collected under the new law, and that the bills of the new board may be paid out of the money collected under Chapter 18022, provided there is a surplus over and above the amount necessary to pay the bills incurred under that law.

December 19, 1940—O-1015.

AUTHORITY TO AUTHORIZE SALE OF MILK IN LARGE
QUANTITIES AT PRICES BELOW THOSE FIXED
BY THE BOARD AS MINIMUM WHOLE-
SALE AND RETAIL PRICES

Gentlemen:

This is in reply to your letter of December 19, in which you request my opinion as to whether the Florida Milk Commission can, in any given milk-control area, give consideration for quantity buying in fixing minimum prices for the sale of milk at wholesale in a given area. I construe your question to be whether the Florida Milk Control Commission can authorize the sale of milk to large consumers at a price below the minimum fixed by the Commission for the area.

It is a universal practice in the American economic system to permit concessions in prices for commodities purchased in large quantities. This practice is predicated upon a sound foundation, for when commodities are sold in large quantities, sale and distribution costs are reduced and credit risks minimized.

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It is, therefore, my opinion that, pursuant to Section 4 (hh) of Chapter 19231, Laws of Florida, Acts of 1939, the Florida Milk Commission has legal authority to make provision by rules and regulations for permitting the sale of milk at prices below the minimum prices fixed in a given milk-control area, so as to make allowances for savings in sale and distribution costs and elimination of credit risks.

It is my understanding that you request this opinion as a guide in dealing with the problem of regulating the sale of milk to Camp Blanding and other extensive military camps located in Florida, which camps will require great quantities of milk. It is my opinion that the principles above stated are applicable to the sale of milk to such military camps. In determining minimum prices to be paid for milk and also the amount of consideration to be accorded to purchasers of large quantities of milk, the Milk Commission should take into consideration the rights of all parties concerned.

SECTION 35

State Officers—Motor Vehicle Department

July 22, 1940—O-872.

LEGALITY OF DEPARTMENTAL RULING RELATING TO
REGISTRATION OF VEHICLES OF OFFICERS
AND ENLISTED MEN IN FEDERAL
MILITARY SERVICE*Dear Sir:*

This is in reply to your letter of July 19.

You state that there has been a ruling of the Motor Vehicle Commissioner in force for the past six or seven years relating to the registration of motor vehicles of officers and enlisted men transferred to Florida from other States to the Naval Base at Pensacola and other such military posts within the State. Under this ruling, such officers and enlisted men are required to secure proper registration of their personally owned and operated motor vehicles. If, however, a licensee is transferred out of the State within the year for which the Florida license was issued, the holder thereof, upon surrender of the Florida license plate, is issued a cash refund of the unused portion of the fee paid for same. You state that individuals connected with the Naval base in Jacksonville question your authority to enforce such a regulation.

Under the provisions of Subsection (14) of Section 3, Chapter 16085, further amending Section 1011, Revised General Statutes, as amended, it is my opinion that the Motor Vehicle Commissioner does have the right to promulgate and enforce such a rule. Subsection (14) reads as follows:

"The State Motor Vehicle Commissioner shall have authority to determine the classification of, and the amount of tax due on any motor vehicle required to be registered under the laws of Florida, and shall have authority and power to fix, determine and assess the amount of registration or re-registration fees and taxes to be paid for registration, re-registration and license thereof and his determination when made and certified to in writing shall be prima facie evidence of the validity, regularity and propriety thereof and of the liability of the motor vehicles involved therein to classification and tax so determined, fixed and assessed. No such determination when made by the State Motor Vehicle Commissioner shall be disregarded or set aside in any court, except when clearly shown to be unwarranted in law or in fact."

Under the provisions of Section 1031, Revised General Statutes, as amended by Section 4 of Chapter 15625, Laws of Florida, Acts of 1931 (Section 1304, Compiled General Laws, Perm. Supplement), authority is provided for making refunds.

I think it is clear that the private motor vehicles of officers and enlisted men stationed in Florida are not exempt from regulation under the laws of Florida. The ruling of the Motor Vehicle Commissioner to which you refer, is fair and equitable and, in my opinion, is authorized under the provisions of law above set forth.

SECTION 36

State Officers — Notaries Public

August 1, 1939—O-501.

PREREQUISITE FOR APPOINTMENT

Dear Sir:

I have your oral request for an opinion as to whether or not a person not a citizen of the State of Florida, by reason of the fact that such person has not lived in the State of Florida a sufficient length of time to become a citizen, can be appointed to the office of Notary Public.

In reply I wish to advise that this office has previously held that under the Constitution of Florida, a Notary Public is a State officer (Attorney General's Biennial Report, 1933-1934, page 583), and under the statutes of the State of Florida in order to be eligible to hold public office, a person must be an elector. The qualifications for an elector are fixed by Article VI, Section 1, of our Constitution, which provides, in part: " * * * shall have resided and had his habitation, domicile, home and place of permanent abode in Florida for one year and in the county for six months."

Ruling Case Law states the rule as follows:

"By reason of the fact that a notary public is held to be a public officer, it has generally been considered that where being an elector is a condition of eligibility to public office under the Constitution of a State, a woman, not being an elector, cannot be appointed a notary public * * *."

I am, therefore, of the opinion that a person who is not qualified to be an elector under the laws of Florida would not be eligible for appointment as a notary public in this State.

September 25, 1939—O-471-4.

AUTHORIZED TO CHARGE FEE FOR ADMINISTERING OATH
TO APPLICATION FOR OPERATORS' AND
CHAUFFEURS' LICENSES

Dear Sir:

In your letter of the 22nd instant, you state a difference of opinion has arisen in respect to the right of notaries public to charge for administering the oath required to applications for operators' and chauffeurs' licenses, when such notaries are in no way connected with the Department of Public Safety. You thereupon ask:

"In your opinion, where an individual has an office in the same office where such licenses are issued, but who is not employed by the department, could the individual under the law charge a notary fee?"

In my letter to you under date of July 14, 1939, I expressed the opinion

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that it is the legislative intent that each county judge in the performance of duties required of him under Chapter 19551, Laws of Florida, Acts of 1939, acts as an officer or agent of the Department, and in that capacity is required to administer without charge the oath taken before him to applications for an instruction permit, and an operators' or chauffeurs' license required by Section 20 of said Act.

While applications for operators' and chauffeurs' licenses are required to be verified by the applicant, it is not required that the oath be taken before the county judge issuing the license or before any other person connected with and acting for the Department of Public Safety. The applicant may in the exercise of the privilege afforded him by the Act, swear to the application before the county judge, but he is not required to under the law.

On the other hand, the applicant, if he chooses to do so, may go before a notary public or any other officer authorized to administer an oath, who is not connected with the Department, and take the oath required, but if he does so, the notary public or officer administering the oath has the lawful right to charge and receive a fee therefor.

In other words, the applicant is entitled to fee service in the administration of the required oath only when he goes before the county judge or some other officer or agent connected with and acting for the Department of Public Safety for that purpose.

October 18, 1939—O-613.

MARRIED WOMEN—COMMISSIONS AND BONDS

Dear Sir:

I have your letter of the 6th instant with enclosures raising the question as to whether a married woman may be commissioned a notary public under her maiden name.

Under the law the wife at marriage takes the husband's name. See *Carlton v. Phelan*, 100 Fla. 1164, 131 So. 117.

Sections 479 to 485, Compiled General Laws of Florida, 1927, relates to notaries public. In Section 479 it is provided for the Governor to make appointments of notaries public and each notary public previous to executing the duties of said office is required to give bond to the Governor in the penalty of \$500.00, conditioned for the due discharge of the said office and also take an oath that he will honestly, diligently and faithfully discharge such duties.

Section 480 recites that women under 21 years of age are hereby declared to be eligible to appointment by the Governor as notaries public, and to hold and exercise the office thereof upon the same terms and conditions, and with the same power and emoluments as notaries now appointed by the Governor.

In addition to the above your attention is called to Article XVI, Section 15, of the State Constitution which recognizes notaries public as officers.

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Your attention is also called to Section 459, Compiled General Laws of Florida, 1927, which provides that no commission shall be issued by the Governor of this State to any person who is required by law to give bond before he shall enter upon the duties of his office until after such bond shall have been duly executed, approved and filed in the office where it is required by law to be deposited, and official notice thereof given to the Governor.

Answering the specific inquiry presented, it is my advice that in order for the bond of an applicant for the position of notary public or other officer to be binding, it would seem proper for the bond to be made under the real name of the applicant and not under an assumed name, and it is my opinion that a married woman should be commissioned as a notary public under her given name and the surname of her husband. For instance, if John Smith marries Grace Brown and his wife applies for a commission as a notary public or other officer, she should be commissioned as Grace Smith or Grace Brown Smith, whichever name she may customarily use.

Incident to the above, I have taken into consideration the further question as to whether a married woman may execute and be bound by the official bond required of a notary public. I find no specific statute pertaining thereto.

However, since under Section 480, Compiled General Laws of Florida, 1927, women under twenty-one years of age are declared to be eligible to appointment as notaries public, and no distinction is made as to married or single women, I think the correct interpretation of said Section is that married women as well as single women are eligible for such appointments and it is my opinion that, being made so eligible, and being required to give a bond under Section 479, Compiled General Laws of Florida, 1927, married women are impliedly authorized to execute and be bound by such required official bonds. See: *Strong v. Duff* (Ky.), 15 S. W. (2d) 517; *First Wisconsin National Bank v. Milwaukee Patent Leather Co.* (Wis.), 190 N. W. 822, 26 A. L. R. 349; *Baldwin's Century Edition of Bouviers Law Dictionary* defining the word "Women"; *Bryan v. Bullock*, 84 Fla. 179, 93 So. 182; *Humphreys v. Smith*, 117 Fla. 239, 157 So. 497; *U. S. v. Garlinghouse*, 25 Fed. Cas. No. 15189.

May 10, 1940—O-798.

PROCEDURE WITH REFERENCE TO COMMISSION AFTER
DIVORCE AND RESTORATION OF MAIDEN NAME

Dear Sir:

You left with me the attached letter and I presume you wish an opinion upon the question therein involved as to the proper procedure necessary when a married woman who is commissioned as such as a Notary Public secures a divorce and has her maiden name restored and wishes to have her Notary Public commission read accordingly.

In reply I wish to advise that I think the proper procedure would be for

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this Notary Public to surrender her commission, you revoke the same and issue a new commission to her in her restored maiden name. There is no provision in the statute whereby a commission once issued can be changed and the bond amended accordingly.

SECTION 37

State Officers—Okeechobee Flood Control District

April 12, 1940—O-781.

OKEECHOBEE FLOOD CONTROL DISTRICT—AUTHORITY TO
EMPLOY A COORDINATOR*Dear Sir:*

This will acknowledge receipt of your letter of April 10 requesting me to give you my opinion as to whether the Okeechobee Flood Control District has legal authority to grant the request of the Florida State Planning Board to assume the payment of a coordinator's salary. You attach a letter from Mr. George G. Gross explaining the matter in detail.

Apparently the investigation is to be made of southeastern Florida water resources with the idea in view of finding some solution of the related problems of drainage and irrigation, flood control, soil conservation, domestic water supply, fire prevention and wild life conservation. Mr. Gross states that the limits of the Okeechobee Flood Control District wholly embraces the area to be included in the joint investigation. He requests that the Okeechobee Flood Control District assume the payment of one-half of the coordinator's salary and the full amount of his office and traveling expenses to an estimated maximum of \$600.00 per month starting February 1, 1940.

I have carefully examined the Act creating the Okeechobee Flood Control District and the powers and authorities of the board set forth there are now contained in Section 1631 (6), Compiled General Laws, Permanent Supplement, which reads:

"1631 (6) Same; Authority and Powers; Plan of Improvements Authorized.—The said Board is hereby authorized and empowered to establish and construct a system of canals, levees, dikes, dams, locks, reservoirs and improve natural waterways to control and regulate the waters of Lake Okeechobee and the Caloosahatchee River and vicinity, to prevent the overflow thereof, and to protect and preserve life and property from loss and damage by reason of the overflow of said Lake Okeechobee and the Caloosahatchee River and vicinity, and to construct, own and operate, under such rules and regulations as may be promulgated by said board, or by the United States or agencies thereof, such works of navigation as may be necessary or incidental to the construction, maintenance and operation of such flood control and navigation works."

The board is also given " * * * all of the powers of a body corporate * * * and to appoint such agents and employees as the business of the board may require." Sec. 1631 (2), C. G. L., Permanent Supplement.

The above quoted provisions of the statute contain the entire authority of the board. The apparent purpose behind this legislative enactment was to provide a State agency that could undertake the construction of a system of

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canals, et cetera, to control and regulate the waters of Lake Okeechobee, the Caloosahatchee River and vicinity, and to prevent the overflow thereof and thereby protect and preserve the life and property, and thereafter to maintain such public works.

I am of the opinion that the board was fully authorized to make all necessary surveys and investigations to the end that this particular work be done and that the board was authorized to make from time to time such further investigations and surveys as it deemed advisable for the purpose of carrying out the duties imposed upon it by the Act above mentioned.

I do not think it would be proper for this board to pay a part of the salary and all the expenses of a coordinator unless it should appear to the board that said work of this coordinator would assist the board in the performance of its duties under the Act above mentioned, in which instance, the board would then have to determine the benefit that would be derived from this work and pay for same on the basis of the actual value thereof to this particular taxing district.

I also think that due consideration should be given to any outstanding contract that may have been made with the United States Government as provided in said Act in order that there will be on hand at all times a sufficient amount of money to carry out any commitments to the Federal Government.

SECTION 38

State Officers — Plant Board

June 12, 1940—O-821.

AUTHORIZED TO ENTER PRIVATE PREMISES TO TREAT,
CUT OR DESTROY PLANTS*Dear Sir:*

This will acknowledge receipt of your letter of June 10 requesting my opinion as to whether or not the State Plant Board, through its agents, servants and employees, has the power to enter upon private property to treat, cut or destroy plants when necessary to prevent or control the dissemination of insect pests and diseases, or to eradicate same.

You call my attention to the case of *Garland Richardson, et al., v. Geo. H. Baldwin, et al.*, decided by the Supreme Court of Florida on May 5, 1936. Same is reported in 168 *Southern*, page 255.

I have examined this case and it appears that same is directly in point as the Supreme Court has decided that:

"Chapter 12291, Acts of 1927, Section 3830, et seq., Compiled General Laws, authorizes the State Plant Board to employ agents and to inspect plants, plant products, or other substances that may in their opinion be capable of carrying insect pests or diseases and for that purpose *they are authorized to enter the premises of anyone and inspect any bundle, package, or container thought to contain plants or other objects thought to contain or be carrying insect pests or diseases.*

"The State Plant Board is also authorized to investigate methods of control, eradication, and prevention of the dissemination of insect pests and diseases and for this purpose may employ agents * * *. It may also supervise or cause the treatment, cutting, and destruction of plants when necessary to prevent or control the dissemination of insect pests and diseases or to eradicate them * * * to prescribe and enforce all necessary rules and regulations." (Italics ours.)

It is therefore apparent that your question should be answered in the affirmative.

September 12, 1940—O-922.

AUTHORITY TO APPOINT BUREAU OF ENTOMOLOGY TO
ENTER UPON PRIVATE PROPERTY FOR THE
PURPOSE OF ERADICATING CERTAIN
PESTS*Dear Sir:*

This will acknowledge receipt of your letter of September 11 with enclosures. You request me to "examine the law under which the State Plant

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Board of Florida operates and let me know if in your opinion the State Plant Board is authorized by law to appoint the Bureau of Entomology, Division of Pink Bollworm Control, to enter upon private property in the State of Florida for the purpose of eradicating the pink bollworm."

Under date of June 12, 1940, I advised Dean Wilmon Newell that the Supreme Court of Florida in the case of Garland Richardson, et al., v. Geo. H. Baldwin, et al., 168 Southern, page 255, had held that the State Plant Board through its agents, servants and employees had the power to enter upon private property and to treat, cut or destroy plants when necessary to prevent or control the dissemination of insect pests and diseases, or to eradicate same.

My construction of this language of the Supreme Court in the above case is that the State Plant Board does have the power through its agents, servants and employees to enter upon private property and to treat, cut or destroy plants when necessary to prevent or control the dissemination of insect pests and diseases or to eradicate the same, but that such agents, servants and employees must be under the supervision and control of the State Plant Board. However, I find under the provisions of Section 3833, Compiled General Laws, 1927, Paragraph (14), the following: "enter into cooperative arrangements with any person, municipality, county and other departments of this State, and boards, officers and authorities of other States and the United States for inspection with reference to insect pests and plant diseases and for the control and eradication thereof * * *."

I therefore believe that the best way to handle this matter would be to enter into an agreement with the Bureau of Entomology whereby its employees in the State of Florida having charge of this work, are under the joint supervision and control of each of said agencies and that the Plant Board may appoint said employees of the Bureau as deputy inspectors without compensation. I think this would be fully authorized by the above quoted portion of Paragraph (14) of the Act.

This procedure is along the lines suggested by Mr. Brown in the last paragraph of his letter to Mr. Palmer under date of September 9.

SECTION 39

State Officers — Racing Commission

January 7, 1939—O-437.

EMPLOYEES OF RACE TRACKS REQUIRED TO BE RESIDENTS
AND CITIZENS OF FLORIDA*Gentlemen:*

You request my opinion concerning the following provision contained in Section 9-B of Chapter 14832, Laws of Florida, Acts of 1931, as amended by Section 9 of Chapter 17276, Laws of Florida, Acts of 1935:

"* * * and provided further that every race track operating in the State of Florida and having a license from the Racing Commission shall be required to employ at least 85 per cent of their employees from bona fide *residents and citizens of the State of Florida*, exclusive of jockeys or apprentices, exercise boys, owners, trainers, clockers and governing and managing officials and heads of the departments of the track." (Italics ours.)

You particularly request my opinion concerning what constitutes "residents and citizens of the State of Florida." In this connection I call your attention to the following from the opinion of the Supreme Court of Florida in the case of *Steuart v. State*, 161 So. 278, text page 379:

"Citizens of the State of Florida are those persons who are born or naturalized in the United States, and subject to the jurisdiction thereof, and who reside in the State of Florida (Fourteenth Amendment to U. S. Constitution), and those persons who are declared to be citizens of the State of Florida by the Constitution or statutes of the State of Florida that are not inconsistent with applicable paramount federal law. See *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588; *Twining v. State of New Jersey*, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97.

"The Constitution and statutes of the State of Florida do not make any one a citizen of Florida who is not a citizen of the United States residing in the State of Florida."

I also call your attention to the following from the opinion of the Supreme Court of Florida in the case of *Warren v. Warren*, 75 So. 35, text page 40:

"We think that the word 'citizen' in this connection means one who having come from another State or country has acquired a permanent residence in this State by actually living in this State with the intention of permanently remaining here, or one who, being originally domiciled in this State, has not changed his or her domicile to another State or country."

While the Supreme Court in the above cases was construing statutes different in nature from the one here involved the fundamental principles would seem to apply equally as well to the determination of the question at hand.

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It is my opinion that one is a bona fide resident and citizen of the State of Florida if:

1. He is a citizen of the United States;
2. If his only permanent home is located within the State of Florida and not elsewhere; and
3. If he actually is present in the State of Florida during the greater part of the time. Temporary visits or trips outside of the State would not affect his status as a bona fide resident.

June 20, 1939—O-385.

AUTHORITY TO SET DATES FOR HORSE RACING—SECTION 2,
SUBDIVISION 1, CHAPTER 17276, ACTS OF 1935

Dear Sir:

This will acknowledge receipt of your letter of June 19 requesting my opinion upon the following question:

"Has the State Racing Commission authority in a county where there is but one horse track and no dog track to set days and dates for horse racing in said county?"

You state that the answer to this question involves a construction of Subdivision 1 of Section 2 of Chapter 17276, Acts of 1935. You state further:

"Horse racing is limited to not exceeding fifty (50) days between December 10 and April 10, and it is particularly important to the Commission which is authorized to fix and set dates for racing in counties where there are one or more horse tracks, and in apportioning said dates in a fair and impartial manner, that it be advised whether they have the power and authority in fixing and setting dates for horse racing in Broward and Dade Counties to apportion the dates assigned to these three (3) horse tracks in a fair and impartial manner and in such manner as the Commission in its lawful discretion may determine."

In reply I wish to advise that this question apparently has been answered by the Supreme Court of Florida in the case of *State v. Stein*, 176 So. 849, where the Court after quoting the above section of the statute, to-wit: Subdivision 1 of Section 2 of Chapter 17276, Acts of 1935, said:

"We do not hold that this section of the Act grants to the permit holder the right to select the dates upon which a horse racing meet will be conducted, but it does require the State Racing Commission to grant the dates within the time fixed by the Act and, while it appears that the Racing Commission may select and fix the dates for the operation of a horse racing track in any county *where only one racing track is permitted*, the statute requires the State Racing Commission to fix such dates in a fair and impartial manner. In doing this it is the duty of the Commission to look to the interest of the State, which

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receives revenue for the operation of the track, and *to the interests of the permit holder, who proposes to operate the track for profit.*" (Italics ours.)

My construction of the Court's language that I have above quoted is that the Racing Commission has the authority "to grant the dates within the time fixed by the Act * * * in any county where only one racing track is permitted * * *" and that the Racing Commission should " * * * fix such dates in a fair and impartial manner * * *" and that the Commission may take into consideration the matter that you have mentioned in your letter which would certainly have a direct bearing upon the dates to be fixed in order that not only the State would derive as much revenue as possible from the operation of the tracks, which to again use the language of the Supreme Court, also takes into consideration " * * * the interest of the permit holder who proposes to operate the track for profit * * *."

I, therefore, answer your question in the affirmative.

SECTION 40

State Officers—Road Department

February 13, 1939—O-54.

MOTOR VEHICLES—WEIGHT LIMITS ON TRUCKS AND LOADS—
DISTINCTION BETWEEN PRIVATE TRUCKS AND THOSE
REGULATED BY RAILROAD COMMISSION*Gentlemen:*

This is in reply to your letter of February 6. You call my attention to subparagraph 4 of Section 3, Chapter 16085, Laws of Florida, Acts of 1933, which provides that no motor vehicle or combination of vehicles with pneumatic tires, shall be operated on a public highway in this State with a gross weight per vehicle, including the weight of such vehicle, in excess of 16,000 pounds. Under certain circumstances therein stated the limit is increased to 18,000 pounds. You further call my attention to the following provision contained in Section 2 of Chapter 18026, Laws of Florida, Acts of 1937:

"No truck or trailer shall be authorized under any Certificate of Public Convenience and Necessity in common carriage to carry a load in excess of 12,000 pounds, and the Commission shall by the terms of all certificates issued by it limit the load weight of every truck or trailer to not more than 12,000 pounds. Every certificate heretofore issued shall be deemed to limit load weight of every truck or trailer to 12,000 pounds and the carriage or any truck or trailer of more than 12,000 pounds shall be unlawful and subject the holder of such certificate to all the penalties prescribed by law and by the provisions of this Act."

In view of the fact that Section 4 of Chapter 18026 provides "All laws in conflict with this Act are hereby repealed" you request my opinion as to whether the weight limitation of 18,000 pounds hereinabove referred to is superseded by the weight limitation of 24,000 pounds provided in the legislative Act of 1937.

In the light of the decisions of the Supreme Court of Florida in the cases of *Dickinson v. Cahoon*, 144 So. 345, and *Leonard v. Sweat*, 152 So. 857, the only conclusion which I can logically reach is that the weight limitation provided in the 1937 Act applies only to vehicles regulated by the Railroad Commission and does not supersede the weight limitation provided by the 1933 Act. This conclusion is inescapable in view of the fact that the 1933 Act and the 1937 Act here considered are simply amendments of the same laws which the Supreme Court of Florida construed in the two cases above cited. As a matter of fact the particular provision hereinabove quoted from the 1937 Act is a re-enactment of the same provision construed by the Supreme Court.

The following is from the opinion of the Supreme Court in the case of *Dickinson v. Cahoon*:

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"The question presented in this habeas corpus proceeding is whether or not the general weight limitation of 16,000 pounds for motor vehicles licensed to operate on the roads of this State applies to a certificated private contract carrier holding a certificate of public convenience and necessity under Section 4 of Chapter 14764, Acts of 1931. * * *

"Chapter 14764, *supra*, was passed by the Legislature and became a law prior to Chapter 15625, *supra*. It is obvious from a consideration of the history as well as the characteristics of Chapter 14764 as a part of the legislative policy of this State, that said chapter, dealing as it does with a particular class of vehicles known as certificated vehicles, was intended to create a separate classification of such certificated vehicles for the purpose of regulation, supervision, and added taxation. This legislative intent to set up a special code of regulations for certificated vehicles as distinguished from all others licensed to use the highways is clearly disclosed by Section 8 of Chapter 15625, which provides in part:

"'But nothing in this Act shall be construed to repeal any part of Senate Bill 411 (Chapter 14764) passed at the regular session of the 1931 Legislature. Provided further that nothing in this Act shall repeal, alter or diminish the mileage tax or fees now provided by law for motor vehicles coming under the supervision of the Railroad Commission of the State of Florida.'

"Consequently, we have upon the statute books of this State two separate and independent statutes relating to the supervision and regulation of motor vehicles. The older of these two statutes deals with the licensing, taxation, and incidental regulation of motor vehicles of every kind except those subsequently classified and separately dealt with by Chapter 13700, Acts of 1929, and its re-enactment and revision as Chapter 14764, Acts of 1931."

In the two decisions of the Supreme Court hereinabove referred to the specific question here proposed was considered. In both cases the Supreme Court held that vehicles subject to regulation by the Railroad Commission constitute a separate class from other vehicles and that a weight limitation specifically applying to such class of vehicles cannot apply to other vehicles.

June 16, 1939—O-383.

**AUTHORITY TO DESIGNATE ADDITIONAL ROADS AS PART OF
THE "7% FEDERAL AID SYSTEM" WITH APPROVAL
OF FEDERAL GOVERNMENT**

Dear Sir:

This is in reply to your letter of May 25, in which you request my opinion as to whether or not the State Road Department has the authority to designate and select additional roads to be added to and become a part of the recognized "7% Federal Aid System" with the approval of the Federal Government.

In the interest of clearness, it is well to first consider just what is meant

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by the "7% Federal Aid System." Briefly stated, it is that system of highways referred to in the "Federal Highway Act," of November 9, 1921, which superseded the "Federal Aid Act," of July 11, 1916. The "Federal Highway Act" is set forth in United States Code Annotated, Title 23, Sections 1 to 25 inclusive. The following provisions from U. S. C. A., Title 23, Section 6, throw some light on the nature of this "7% Federal Aid System:"

"Before any projects are approved in any State, such State, through its State highway department shall select or designate a system of highways not to exceed 7 per centum of the total highway mileage of such State as shown by the records of the State Highway Department on November 9, 1921.

"Upon this system all Federal-aid apportionments shall be expended.

"Highways which may receive Federal aid shall be divided into two classes, one of which shall be known as primary or interstate highways, and shall not exceed three-sevenths of the total mileage which may receive Federal aid, and the other which shall connect or correlate therewith and be known as secondary or intercounty highways, and shall consist of the remainder of the mileage which may receive Federal aid.

"The Secretary of Agriculture shall have authority to approve in whole or in part the systems as designated or to require modifications or revisions thereof: *Provided*, That the States shall submit to the Secretary of Agriculture for his approval any proposed revisions of the designated systems of highways above provided for."

An amendment to Section 6, Title 23, U. S. C. A., provides for extending and continuing the "7% Federal Aid System." This amendment reads as follows:

"Whenever provision has been made by any State for the completion and maintenance of 90 per centum of its system of primary or interstate and secondary or intercounty highways equal to 7 per centum of the total mileage of such State, as required by this chapter, said State through its State highway department, by and with the approval of the Secretary of Agriculture, is hereby authorized to increase the mileage of the primary or interstate and secondary or intercounty systems by additional mileage equal to not more than 1 per centum of said total mileage of such State, and thereafter to make like increases in the mileage of said systems whenever provision has been made for the completion and maintenance of 90 per centum of the mileage of said systems previously authorized in accordance herewith. (As amended July 21, 1932, c. 520, Sec. 304, 47 Stat. 722.)"

Under Title 23, U. S. C. A., any funds apportioned to the States as Federal aid are available for expenditure for one year after the close of the fiscal year for which such funds are authorized and any unexpended funds are re-apportioned among the States. In view of the provisions of the "Federal Highway Act," requiring Federal approval of highway projects in the "7% Federal Aid System," it is conceivable that the share of the State of Florida

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in the Federal funds for a year could be lost, if the Federal authorities refused to approve available State highway projects. In the case of *Singleton v. Heathman*, 300 S. W. 242, the Court of Civil Appeals of Texas held that under the "Federal Highway Act," any attempt on the part of the State to designate the route of Federal-aided State highways without the approval of the Federal authorities would be ineffective.

The Florida Legislature of 1923 enacted Chapter 9311, which established and designated a system of State roads. In Section 1 of Chapter 9311, State roads numbered 1 to 28 are designated and located. It is further provided in said Section 1, the order in which the roads are to be constructed, but it is specifically provided that the provisions therein contained shall not be construed to interfere, in any way, with the construction and maintenance of such roads as have been designated as part of the "Federal 7% Highway System," which is defined as consisting of certain numbered roads and "also 45 miles to be designated by the State Road Department and Federal Government, as part of the "Federal 7% System." Section 3 of Chapter 9311, contains the following: "Provided, that said department shall not hereafter have the power to designate and establish State roads." The Legislature of 1925, in Chapter 10269, amended Section 1 of Chapter 9311, so as to add to the words, "also 45 miles to be designated by the State Road Department and the Federal Government, as part of the Federal 7% System," the words, "and such further mileage of roads as may be in the future allowed, allotted, and designated by the State Road Department and Federal Government as part of the Federal 7% System." The above amendment added by the Legislature of 1925 has not been carried forward in the permanent supplement of the Compiled General Laws of Florida. I do not find, however, that any subsequent statute has eliminated that amendment, and it is still the law.

For many years, at each session of the Legislature an Act has been passed authorizing the State Road Department to receive the grants of money available under the Federal laws relating to Federal aid in construction of highways, which Federal laws we have hereinabove considered. The State Road Department is authorized to accept such sums so made available in accordance with the terms and conditions expressed in the Federal laws. See Chapter 18280, Laws of Florida Acts of 1937, and see House Bill No. 141 of the 1939 session of the Florida Legislature.

The only problem here presented is whether the provision in Section 3 of Chapter 9311, to the effect that the State Road Department shall not thereafter have the power to designate and establish State roads, has eliminated any authority in the State Road Department to designate and locate, with the approval of the Federal authorities, any road as a part of the "7% Federal Aid System" which has not been expressly designated by the Legislature. In other words, would the designation and location, with the approval of the Federal authorities of a road as a part of the "Federal 7% Highway System" be the establishment of a State road contrary to the provisions of Section 3 of Chapter 9311?

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It is my opinion that under Section 1 of Chapter 9311, the "Federal 7% Highway System" is established as a part of the State roads of Florida. Since Section 1 of Chapter 9311 was amended by Chapter 10269, Acts of 1925, so as to enlarge the "Federal 7% Highway System" to include "such further mileage of roads as may be in the future allowed, allotted, and designated by the State Road Department and Federal Government," the conclusion is inescapable that the selection and designation of a road to be included in the "Federal 7% Highway System" does not constitute the establishment of a new State road. The Legislature itself has designated and established the "Federal 7% Highway System" as part of the system of State roads of Florida. When a road is brought within the "Federal 7% Highway System" pursuant to specific statutory authorization, that road becomes a State road, not because it is so designated by the State Road Department, but because it is part of the "Federal 7% Highway System," which the Legislature has designated and established as being embraced within the system of State roads. This conclusion is inescapable because all of the statutes relating to the subject of State roads and the "Federal 7% Highway System" must be construed together. It is inconceivable that the Legislature intended to prohibit the State Road Department from including roads in the "Federal 7% Highway System" by the provision above referred to in Section 3 of Chapter 9311, Acts of 1923, in view of other statutory provisions providing that the "Federal 7% Highway System" shall embrace further mileage to be included in the future in that system by the State Road Department and the Federal Government.

It is therefore my opinion that the State Road Department has the authority, with the approval of the authorized representatives of the Federal Government, to include roads in the "7% Federal Aid System."

October 7, 1939—O-586.

**AUTHORITY TO ENTER INTO AGREEMENT WITH GEORGIA
HIGHWAY DEPARTMENT TO CONSTRUCT BRIDGE AT
STATE LINE—CHAPTER 19161, ACTS OF 1939.**

Gentlemen:

You state that at the last meeting of the Road Department it adopted a resolution authorizing the expenditure by the Department of \$30,000 to pay part of the construction cost of a bridge across the Withlacoochee River to connect a highway leading from Madison, Florida, to Valdosta, Georgia, that part of the highway in Florida being State Road 106, provided such expenditure was first approved as to its legality by the Attorney General.

You further state that the Georgia Highway Department has estimated the cost of constructing the bridge at \$65,475.00, together with an additional amount for engineering and contingencies in the sum of \$6,547.50. The Highway Department of Georgia will let a contract to construct said bridge, providing the State Road Department of Florida will contribute the said sum

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of \$30,000.00. The major part of the bridge, when constructed, will lie in Georgia, and its southern approach will lie partly in Florida and will physically connect State Road 106.

It is my opinion that the proposed expenditure is authorized by the State Road Department under the provisions of Chapter 19161, Laws of Florida, Acts of 1939, Section 1 of which reads as follows:

"Section 1. The State Road Department of Florida is hereby authorized and empowered, whenever it deems it practicable and to the best interests of the State Road System of Florida, to cooperate with any State adjoining the State of Florida, or the highway department of any such adjoining State, or any political subdivision or other duly authorized agency therein, in the construction, building, or by participation in the cost or purchase, of any bridge, which extends from said adjoining State so that said bridge or one of its approaches physically connects, or when constructed will physically connect, any designated and established State Road of the State System of Roads of Florida, to the extent of fifty (50%) per cent of the construction cost of any such bridge, or the purchase price thereof."

April 2, 1940—O-777.

**APPLICATION FOR GRANT OF PERPETUAL EASEMENT FOR
CAUSEWAY AND BRIDGE ACROSS OLD TAMPA BAY**

Gentlemen:

You have referred this matter to me with the request for my opinion as to the authority of the Trustees of the Internal Improvement Fund to grant to the State Road Department of Florida a perpetual easement for right-of-way purposes for the construction of a causeway and bridge for public road purposes over, through, and across Old Tampa Bay, a navigable body of water in Hillsborough and Pinellas Counties, and the submerged lands adjacent thereto.

In this connection I have given careful consideration to the arguments for and against the granting of said application, as contained in the briefs of counsel submitted. I have also considered the long-established custom of the trustees in granting similar requests, and have reached the conclusion, and I am of the opinion, that the trustees have the authority to grant to the State Road Department perpetual easements for public road purposes, including bridges and causeways over, through, and across navigable streams and bodies of water, which authority includes the right to grant the above application

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November 14, 1940—O-983.

**AUTHORIZED TO AWARD BIDS TO LOWEST
RESPONSIBLE BIDDER**

Dear Sir:

I am in receipt of a letter from the Chairman of the State Road Department to you in which he states as follows:

"On November 7, 1940, the State Road Department received bids for the construction of the above project. The following bids were submitted:

- | | |
|---|--------------|
| "1. W. L. Cobb Construction Co. | \$155,790.94 |
| "2. Cone Brothers Construction Co. | 168,188.07 |
| "3. Smith Service Company, Inc. | 171,364.16 |

"The engineers of the State Road Department considered the low bid a little too high.

"When this was brought to the attention of the low bidder, W. L. Cobb Construction Company, this company advised the State Road Department that it would be willing to accept a fair and reasonable reduction of the bid it submitted so as to permit the contract to be awarded to W. L. Cobb Construction Company. The State Road Department considers that the proposition made by W. L. Cobb Construction Company, insofar as the reduction of its bid is concerned, is entirely reasonable and satisfactory.

"It has been the practice of the Road Department on numerous occasions to allow the low bidder to reduce his bid to meet the estimates of the Road Department and contracts have been awarded for such reduced figures," and in response to your request for my opinion as to whether or not it is permissible for the State Road Department to enter into such contracts, I would state as follows:

Section 1635, C. G. L., 1927, provides in part as follows:

"* * * and to advertise for bids on same at least once a week for not less than two consecutive weeks in some newspaper having a general circulation in the county where the proposed work is located; and the State Road Department may, at its discretion, award the proposed work to the lowest responsible bidder, or it may reject all bids and proceed to perform the work with convict labor or free labor, and may purchase such equipment and supplies as may be necessary for the efficient and economical prosecution of the work."

It appears that the requirements of this statute have been met because advertisements were duly made for bids and the Road Department is awarding the bid to the lowest responsible bidder at a price even below his bid, which in my opinion is entirely permissible, the effect of such award being to benefit the State.

SECTION 41

State Officers—Soil Conservation Board

October 31, 1939—O-630.

SOIL CONSERVATION DISTRICTS—APPLICATION OF CHAPTER
18144, ACTS OF 1937, AS AMENDED BY CHAPTER
19473, ACTS OF 1939*Gentlemen:*

You call my attention to a district known as the "Holmes Creek Soil Conservation District" consisting of 275,000 acres in Jackson and Holmes Counties, heretofore created pursuant to Chapter 18144, Laws of Florida, Acts of 1937. You request my opinion as to whether, in order to assure this district legal status under the provisions of Chapter 19473, Acts of 1939, the procedure set forth in Chapter 19473, must be completely followed. In other words, would said district have to be reorganized from the very beginning under provisions of Chapter 19473?

It is my opinion that the only safe method to follow would be start from the beginning. This would be the only sure means of eliminating the effects of obviously unconstitutional features contained in Chapter 18144, Acts of 1937.

You further request my opinion as to whether the newly created State Soil Conservation Board may act upon petitions for creation of districts heretofore filed with the State Soil Conservation Committee, organized under Chapter 18144, Acts of 1937. With regard to this question, it would also be my opinion that proceedings to create such districts should follow the provisions of Chapter 19473, Acts of 1939, from the very beginning. This would eliminate any objection which might hereafter be raised to the effect that the State Board of Soil Conservation, in creating a particular district, acted on a petition filed pursuant to a law which had been repealed with the State Soil Conservation Committee which had been abolished.

August 29, 1940—O-907.

SOIL CONSERVATION DISTRICTS—COUNTY COMMISSIONER
INELIGIBLE TO HOLD OFFICE OF SUPERVISOR
OF DISTRICT*Gentlemen:*

You request my opinion as to whether a county commissioner is eligible to hold the office of Supervisor of a Soil Conservation District established under the provisions of Chapter 19473, Laws of Florida, Acts of 1939.

It is my opinion that no person can, under Article XVI, Section 15 of the Florida Constitution, be a county commissioner and a Supervisor of a Soil Conservation District, under Chapter 19473, Laws of Florida, Acts of 1939, at the same time

SECTION 42

**State Officers—Trustees Internal Improvement
Fund**

August 2, 1939—O-511.

VALIDITY OF LEASE OF LAND UNDER SECTION 65,
CHAPTER 14717, ACTS OF 1931*Dear Sir:*

I have your letter of the 27th ultimo, relative to the above captioned matter and reading as follows:

"The Trustees of the Internal Improvement Fund in their settlement with the Everglades Drainage District retained Certificate No. 189, sale of July 7, 1930, covering all, less E $\frac{1}{2}$ of E $\frac{1}{2}$ of SE $\frac{1}{4}$ of SE $\frac{1}{4}$ and less 12 acres in Tract 47, of Section 36, Township 42 South, Range 31 East, containing 615 acres. Under the terms of the old Drainage Act the title to delinquent Everglades Drainage Tax lands vests in the Trustees after the certificate becomes two years old.

"The Trustees have agreed to lease the above area to Mr. Guy Winthrop of this city, the lease to be for a period of five years and the land to be used for grazing purposes only. The County Agent of Glades County advises us that another party by the name of Joe B. Hendry has acquired title from the record title holder. They have made no effort, however, to acquire title from the Trustees.

"Mr. Winthrop desires an opinion as to whether or not his lease from the Trustees based on the tax title is valid and whether or not he has authority to take possession of said land."

The said lands were vested in the Trustees of the Internal Improvement Fund, under the provisions of Section 65, Chapter 14717, Laws of Florida, Acts of 1931. Paragraph (e) of said Section 65 reads as follows:

"Upon the expiration of the time for redemption with respect to certificates which shall be retained by Trustees of Internal Improvement Fund no further right to redeem shall exist and the said Trustees shall be deemed to have a fee simple title to all lands covered by unredeemed certificates in their hands, and such lands shall constitute a part of the Internal Improvement Fund of the State of Florida and shall be held and disposed of by such Trustees in like manner as is provided by law with respect to other lands constituting a part of such Internal Improvement Fund."

Assuming that the said tax certificate is valid, it is my opinion that such proposed lease would be valid and the lessee would have authority to take possession of said lands.

STATE OFFICERS — Trustees Internal Improvement Fund

January 25, 1940—O-704.

**NOT AUTHORIZED TO DEDICATE LANDS VESTED IN THE
STATE UNDER THE MURPHY LAW (CHAPTER 18296)
TO THE FLORIDA BOARD OF FORESTRY FOR
STATE FOREST OR PARK PURPOSES***Dear Sir:*

I am in receipt of your letter of the 22nd in which you inquire as to whether or not the Trustees of the Internal Improvement Fund of the State of Florida have authority to dedicate lands vested in the State of Florida under Chapter 18296 to the Florida Board of Forestry for State forest or park purposes, and in reply thereto would state that Section 9 of said Act provides in part as follows:

"* * * and the State of Florida thereafter, through the Trustees of Internal Improvement Fund shall be authorized and empowered to sell the said lands to the highest and best bidder for cash at such time and after giving such notice and according to such rules and regulations as may be fixed and adopted from time to time by the said Trustees of the Internal Improvement Fund."

It is my opinion that under this section of the law, the Trustees of the Internal Improvement Fund do not have authority to dedicate this land for State forest or park purposes, and that the only authority they have is to sell this land as directed by the above mentioned section.

March 15, 1940—O-756.

EFFECT OF CHAPTER 19877, LAWS OF FLORIDA, ACTS OF 1939*Gentlemen:*

In the administration of the duties, authority and power conferred on the Trustees of the Internal Improvement Fund by Section 9 of Chapter 18296, Laws of Florida, Acts of 1937, the question has arisen in respect to the effect of Chapter 19877, Laws of Florida, Special Acts of 1939, as to lands in Hillsborough County upon which said county holds liens by reason of the provisions of Chapter 10140, Laws of Florida, Acts of 1925.

Chapter 19877 is subject to one of two constructions, namely, that the title to lots, tracts and parcels of land in Hillsborough County, upon which said county holds liens by reason of the provisions of Chapter 10140, Acts of 1925, passed to the State of Florida by operation of Section 9 of Chapter 18296, subject to the liens held by Hillsborough County under the provisions of Chapter 10140 and subject to the right of Hillsborough County under authority of Section 2 of Chapter 19877 to have such lands deeded to the County of Hillsborough; or that by reason of Chapter 19877 the title to such lands did not pass to the State by operation of Section 9 of Chapter 18296, but

STATE OFFICERS — Trustees Internal Improvement Fund

that the title to all such lands, together with the liens thereon, continue as if Section 9 of Chapter 18296 did not exist.

If the former construction be accepted, it must be upon the theory that the Legislature intended Chapter 19877 to have the effect of foreclosing the liens of Hillsborough County acquired under Chapter 10140, Acts of 1925, without giving to the lienor his day in Court and without regard to whether the obligation secured by such liens may be due, and the further effect of wiping out the lien of the State, county and districts for taxes evidenced by the tax certificates held by the State which would have operated to cause the title to said lands to vest in the State under Section 9 of Chapter 18296, except for the provisions of Chapter 19877—obviously a conclusion which the Legislature never intended.

On the other hand, a construction to the effect that title did not pass to the State as to lands on which Hillsborough County holds liens by reason of the provisions of Chapter 10140, leaves all parties protected in their rights, the same as if Section 9 of Chapter 18296 did not or never had existed.

Therefore, assuming the validity of Chapter 19877, Special Acts of 1939, but as to which I express no opinion, I have reached the conclusion and am of the opinion that as to all lots, tracts, or parcels of land in Hillsborough County, Florida, upon which said county may hold liens by reason of the provisions of Chapter 10140, Laws of Florida, Acts of 1925, the title thereto did not pass to the State by operation of Section 9 of Chapter 18296, Laws of Florida, Acts of 1937, and that the trustees have no duty, authority, or power in respect thereto.

SECTION 43

State Officers — Welfare Board

January 11, 1939—O-620.

TRAVELING EXPENSES OF MEMBERS OF BOARD

Dear Sir:

This is in reply to your letter of January 4, 1939, reading as follows:

"According to Chapter 16184, General Laws of Florida, 1933, the maximum amount to be allowed State officers and State employees when traveling on State business for subsistence shall not be more than \$4.50 per day.

"Section 1 of Chapter 18285, General Laws of Florida, 1937, provides for the appointment of members of the State Welfare Board who shall serve without compensation, except for their necessary expenses, which shall not exceed \$1,200.00 annually.

"In view of the above provisions are the members of the State Welfare Board restricted or limited to the \$4.50 per day for subsistence when traveling in the State?

"I will appreciate an opinion on this question at your earliest convenience."

Chapter 16184, Acts of 1933, fixes the maximum amount which State officers, other than Constitutional officers, may charge per day as expenses for subsistence. The members of the State Welfare Board are State officers, but are not Constitutional officers, and so the provisions of this Act apply to them, unless some other statute renders this Act inapplicable to them.

Chapter 18285, Acts of 1937, does not deal with the subject of maximum daily allowance for subsistence, but only with the maximum yearly amount allowed for all types of expense of State Welfare Board members. Hence I am of the opinion that the State Welfare Board members are limited to \$4.50 per day for subsistence when traveling in the State.

July 8, 1939—O-447.

AUTHORITY TO EXCEED LEGISLATIVE APPROPRIATION

Dear Sir:

This is in reply to your letter of July 7, reading as follows:

"There has been a theory advanced by a member of the State Welfare Board that under the law under which the State Welfare Board operates, being Chapter 18285 of 1937 Session of the Legislature as amended by Chapter 19375, Acts of 1939, does give the State board authority to add all cases where eligibility requirements are met, regardless of appropriation.

"In Section 2, Duties of State Welfare Board, the law does say: 'It shall be the duty of the State Welfare Board to determine the amount of

STATE OFFICERS — Welfare Board

money or other things of value, subject to the limitations herein provided, that each applicant or recipient of assistance or benefits under this Act is entitled to receive,'

"Under Section 17 'There shall be paid a monthly assistance of not more than Thirty Dollars (\$30.00) to any person who:'

"Section 24 of this Act—'This Act shall be liberally construed to the end that the work of social welfare shall be consummated as equitably and expeditiously as possible.'

"The above sections have to do with placement of those in need on the assistance rolls of the State. Section 23, however, limits the appropriation to \$3,400,000 for old-age assistance, aid to the blind and administrative costs, and \$400,000 for aid to dependent children.

"The question, therefore, is whether or not, under the law, the State Welfare Board can add names and spend more money than is appropriated.

"The State board meets Saturday, July 15, and it would be sincerely appreciated if an opinion could be had from you prior to that date."

It is my opinion that the State Welfare Board may not exceed the amount appropriated in the Act. See Article IX, Section 4, of the Florida Constitution. The funds appropriated by the Legislature should be so administered that all eligible individuals will participate on an equitable basis.

July 13, 1939—O-470.

NOT AUTHORIZED TO EXCLUDE ALIENS FROM OLD-AGE ASSISTANCE ROLLS

Dear Sir:

In your letter of the 13th instant you request my opinion as to the authority of the State Welfare Board to exclude aliens from the old-age assistance rolls of the Welfare Department of the State of Florida by rule as of July 1, 1939. Also as to the authority of the board to require that blind persons must be citizens, in order to receive assistance from the Welfare Department.

The requirements for old-age assistance are five numbers and are set out in subparagraphs (a), (b), (c), (d), and (e) of Section 17 of Chapter 18285, Acts of 1937. The requirements for participation in aid to the blind are five in number and are set out in subparagraphs (a), (b), (c), (d) and (e) of Section 18 of Chapter 18285.

Subparagraph (b) of Section 17 and subparagraph (a) of Section 18 require persons to be residents of the State of Florida at least five years of the nine years immediately preceding application for old-age assistance or aid to the blind, as the case may be, and that such persons have resided in the State for the year immediately preceding the application.

STATE OFFICERS — Welfare Board

There is no requirement in Chapter 18285, Acts of 1937, that such persons be citizens of the United States or of the State of Florida.

The Legislature by the enactment of Chapter 19375, Laws of Florida, Acts of 1939, amended Section 17 of Chapter 18285, Acts of 1937, by adding subparagraph (f) to the requirements for old-age assistance, which reads as follows:

"Provided, however, that on and after January 1, 1940, no assistance shall be paid to any person who has met the requirements of subsections (a), (b), (c), (d) and (e) of this section, unless in addition thereto, such person is a citizen of the United States."

The addition of this paragraph and new requirement indicates in the first place that the Legislature knew that aliens have been heretofore treated the same as citizens in the administration of said Act. It also indicates a legislative intent that aliens shall continue to be treated the same as citizens until January 1, 1940.

This being the legislative intent, the State Welfare Board is without authority to exclude aliens from old-age assistance by rule or regulation as of July 1, 1939, or at any time prior to January 1, 1940.

Blind aliens meeting the requirements for aid fixed by Section 18 of Chapter 18285, Acts of 1937, are under the terms of said Act entitled to be treated the same as citizens, and the board is without authority of law to treat them differently.

January 30, 1940—O-721.

INTERPRETATION OF STATUTE CONCERNING DROPPING OF
ALIENS FROM WELFARE ROLLS AS APPLIED TO
EMPLOYEES OF WELFARE BOARD

Dear Sir:

In your letter of the 27th instant you ask to be advised whether the interpretation of the Welfare Rolls applies also to employees of the Welfare Board.

The Legislature of 1939 by Chapter 19375 amended Section 17 of Chapter 18285, Acts of 1937, to provide that on and after July 1, 1940, no old-age assistance shall be paid to any person unless in addition to the other qualifications required such person is a citizen of the United States.

This restriction as to citizenship does not apply to employees of the Welfare Board. The matter of requiring employees of the Welfare Board to be citizens of the United States is one of policy to be determined by the board in the exercise of its judgment and discretion.

SECTION 44

State Officers—Walton County Bridge Authority

March 30, 1939—O-153.

CHAPTER 17692, REPEALED BY CHAPTER 18975, THOUGH ACTS
OF DEFACTO OFFICER AUTHORIZED*Dear Sir:*

From your letter of the 28th instant and the accompanying letter to the Honorable D. Stuart Gillis of the 25th instant, it is noted that one G. B. Campbell was in June, 1935, commissioned as a member of the Walton County Bridge Authority created by Chapter 17692 and reappointed in November, 1936, until July 1, 1939.

The point of inquiry, as I understand it, is whether the enactment of Chapter 18975, Special Acts of 1937, had the effect of repealing Chapter 17692, Special Acts of 1935, and if so, whether such repeal would operate to terminate the commission held by Mr. Campbell under Chapter 17692.

Chapter 17692, Special Acts of 1935, was an Act creating Walton County Bridge Authority, providing for its powers and duties, and authorizing it to construct a bridge or bridges and approaches thereto across the Choctawhatchee Bay or Choctawhatchee River on State Road No. 152, connecting State Road 10 and State Road 115: to maintain and operate said bridge or bridges and charge tolls and rentals thereon, and to issue bonds, and providing for the payment of same: limiting the corporate existence of said board to a period of only five years, and thereafter until all its liabilities have been met and its bonds paid in full or otherwise discharged.

Chapter 18975, Special Acts of 1937, is an Act creating Walton County Bridge Authority, giving it the same powers and duties as those conferred by Chapter 17692, with the additional right granted to the State Road Department to lease such bridge or bridges for a period of twenty years, and again limiting the existence of said Walton County Bridge Authority to a period of five years from the enactment of Chapter 18975, or until such time as all bonds issued under said Act have been paid in full or otherwise discharged. Thus it appears that Chapter 18975 covers the whole subject matter of Chapter 17692.

The purpose for the creation of the Walton County Bridge Authority was the construction of a bridge or bridges and approaches thereto across the Choctawhatchee Bay or Choctawhatchee River connecting State Road No. 10 and State Road No. 115, and to provide for the payment of same. It can hardly be conceived that the Legislature by the enactment of Chapter 18975 intended to have two separate boards with identical powers operating at the same time to accomplish one and the same purpose. It therefore appears obvious that the intent actuating the Legislature in the enactment of Chapter 18975 was that it should be a revision of and substitute for Chapter 17692.

STATE OFFICERS — Walton County Bridge Authority

The rule of construction in such cases of long establishment and adherence by our own Supreme Court is that where a statute covers the whole subject matter of an earlier Act, and was evidently intended to be a revision of or substitute for the earlier Act, it operates as a repeal of the earlier Act to the extent that the provisions of the former Act are revised and supplied, although the former Act is not repugnant to or inconsistent with the latter Act, and although the latter Act contains no provision expressly repealing the former Act. *Jernigan v. Holden*, 34 Fla. 530, 16 So. 413; *State v. Rose*, 97 Fla. 710, 122 So. 225; *State v. Stoutamire*, 98 Fla. 486, 123 So. 834; *Flood v. State*, 100 Fla. 70, 129 So. 861; *Realty Board and Share Company v. Englar*, 104 Fla. 329, 143 So. 152; *State ex rel. First Savings & Trust Company of Tampa v. Sholtz*, 125 Fla. 361, 169 So. 849.

Applying the rule of construction here stated, I am of the opinion that Chapter 18975 was intended to be and is a revision of and substitute for Chapter 17692, and had the effect of repealing Chapter 17692 on and from the effective date of Chapter 18975, which was June 11, 1937, and that the repeal of Chapter 17692 terminated the commission of Mr. Campbell under Chapter 17692 as of June 11, 1937.

It follows, therefore, that Mr. Campbell's commission issued in November, 1936, under Chapter 17692, to run to July 1, 1936, was not valid on December 19, 1938, and that there was a vacancy in office under Chapter 18975, Special Acts of 1937, until the commission issued to Mr. Campbell February 1, 1939, under the 1937 Act, but inasmuch as Mr. Campbell presumed to act under his commission issued in November, 1936, until February 1, 1939, his acts during said period as a member of the Walton County Bridge Authority were the acts of a defacto officer in all respects authorized by Chapter 18975, Special Acts of 1937.

CHAPTER X

TAXATION

SECTION 1

Ad Valorem Taxes

August 29, 1940—O-908.

MUNICIPAL ELECTRIC PLANTS AND DISTRIBUTION SYSTEMS NOT SUBJECT TO

Dear Sir:

This will acknowledge receipt of your letter of August 28. You state:

"I am in receipt of a letter from a tax assessor from which I quote the following: 'have called my attention to the case of State ex rel. Burbridge, et al., v. St. John, Tax Assessor, reported in 197 Southern Reporter, page 131, as well as the case of Lakeland v. Amos, reported in 143 Southern Reporter, page 744-747. Of course I do not know the meanings of these opinions and would like to have you advise me whether or not the electric light plant and distribution system owned by the municipality is subject to ad valorem taxation and whether or not the same should be placed upon the tax roll. In this connection, I might say that the distribution system extends in one or two instances beyond the corporate limits of the city.'

"I will thank you to advise me in the premises."

In reply I wish to advise that I have examined the cases you refer to and I am unable to find any language in the opinions of the Court in these cases that is susceptible of a construction that the electric light plant and distribution system owned by a municipality is subject to ad valorem taxation. On the contrary the Court has been very careful in the language it used to avoid deciding this question. This was apparently done for the reason that this particular question was not before the Court.

In the City of Lakeland v. Amos case, 143 So., page 744, the Court said:

"The tax is on the corporation, firm or individual for the privilege of engaging in the business or occupation of selling electricity, etc., and not upon money received for sales, though the excise is measured by reference to gross receipts from such sales." It is imposed without reference to profits or net income. *It is not directly or indirectly levied upon any property, but is imposed directly and exclusively upon the business transactions of selling electricity, etc. * * *.*"

Again the Court said:

"While the organic law intends that the governmental functions and

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property of municipalities shall not be taxed, the Constitution does not exempt the authorized corporate business occupations or proprietary activities of municipal corporations from taxation * * *."

In the case of *State ex rel. Burbridge, et al., v. St. John, Tax Assessor*, reported in 197 Southern, page 131, the Court said:

"If this housing project property was *owned by the City of Jacksonville*, it might possibly be contended with more plausibility that it should be held exempt on the ground that it was used for a public purpose. But where, as here, *the property is now owned by the City*, the title and control of same being vested in the Housing Authority, a distinct entity, the authorities above cited require us to hold that the property here involved is not exempt from taxation under the quoted provision of our Constitution."

I am therefore of the opinion that the Court by the language used in the two cases above discussed, specifically limited the application thereof to the particular questions involved in said cases and that these cases are not authority for the proposition that the electric light plant and distribution system owned by a municipality is subject to ad valorem taxes.

Since the question is submitted generally as to whether or not the electric light plants and distribution systems owned by municipalities are subject to ad valorem taxation and whether or not same should be placed upon the tax roll, I wish to advise that I am unable to find any decision by our Supreme Court that has directly passed upon the same. However, I find the general law to be in other States where the courts of last resort have passed upon a similar question under constitutional and statutory provisions such as ours that municipally-owned electric light plants are not subject to ad valorem taxation.

61 C. J. 421, Taxation, paragraph 456, states the rule as follows:

"The rule that constitutional and statutory provisions exempting property which it has always been the policy of the State to exempt shall be construed liberally applies to provisions exempting municipally-owned works and utilities, and constitutional and statutory provisions exempting municipally owned property used wholly and exclusively for municipal purposes are construed to exempt property of municipal works and utilities so held, and used even though it is a source of revenue and profit to the municipality where such revenue is paid into the city treasury and used for municipal purposes * * *."

I find in L. R. A. 1915A, page 1118, et seq., numerous cases compiled therein that sustain the text above quoted.

I therefore am of the opinion that since we have no decision of our Supreme Court as I have pointed out above that directly passes upon this question, and in view of the fact that the courts of other States wherein this question has been raised have held that such property is exempt from ad valorem taxation, that until our Supreme Court has specifically held that

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municipal electric plants and distribution systems are subject to ad valorem taxation, it would not be proper to place same upon the tax rolls.

November 14, 1940—O-984.

**AD VALOREM TAXES—WHETHER OR NOT AEROPLANES
ARE SUBJECT TO**

Dear Sir:

I am in receipt of your letter of the 7th in which you state as follows:

"Please advise me if airplanes can be classed as personal property for the purpose of taxation, and if so, under what conditions and circumstances they may be taxed," and in reply thereto would state that Section 13 of Article IX of the Constitution of Florida provides as follows:

"Motor vehicles, as property, shall be subject to only one form of taxation which shall be a license tax for the operation of such motor vehicles, which license tax shall be in such amount and levied for such purpose as the Legislature may, by law, provide, and shall be in lieu of all ad valorem taxes assessable against motor vehicles as personal property."

You will see that this Section prohibits the taxing of motor vehicles except by a license tax for the operation thereof. While it may be contended that an aeroplane is a motor vehicle, the historical background of the above amendment to the Constitution of this State shows that it was adopted by the people in order to prohibit the collection of any personal property tax on automobiles due to the fact that the owners thereof paid a high license tax for the right of operation and also a considerable amount of taxes when they purchased gasoline to operate the motor vehicles.

Another thing to be considered is that Chapter 16789, Laws of Florida, 1935, exempts gasoline used in aeroplane motors from the gasoline tax in this State; also the fact that no license tax of any kind is imposed upon the use or operation of aeroplanes within this State. In view of the foregoing facts, it is my opinion that Section 13 of Article IX of the Constitution of Florida does not prohibit the taxing of aeroplanes by ad valorem taxes.

The Supreme Court of the United States in the case of William W. McBoyle, Petitioner, v. United States of America, reported in 75 L. Ed., page 816, held that an aeroplane could not come within the contemplation of the National Motor Vehicle Theft Act.

As to the second part of your question in which you inquire under what conditions and circumstances aeroplanes could be taxed as personal property, I would state that they should be taxed as all other personal property; that is, where the property is situate.

SECTION 2

Taxation—Excise Tax

November 29, 1939—O-665.

GAS TAX—DUTIES OF COMPTROLLER RE: DISTRIBUTION
REGARDLESS OF VETOED BILLS*Dear Sir:*

I acknowledge receipt of your letter of the 27th instant, enclosing letter from the Honorable Henry C. Tillman, Assistant County Attorney for Hillsborough County, dated November 16, 1939, on the subject of which you ask my opinion as to your duties.

It appears that certain bills introduced in and passed by the 1939 session of the Legislature provided for a method of allocation of the gas tax moneys different from the method fixed in the now existing statute on the subject. It also appears that the bills referred to, which were Senate Bills numbers 1216, 1217, and 1218, were vetoed by the Governor after final adjournment of the Legislature.

I note the position of Mr. Tillman as expressed in his letter to the effect that if these bills are passed over the Governor's veto by the Legislature at its next session, the distribution provision thereof will operate from October 1, 1939, and he thereupon puts you on notice of the intention of Hillsborough County to demand distribution of the gas tax moneys retroactively from October 1, 1939.

The allocation of the gas tax moneys is fixed by legislative enactment, and your duties in connection therewith are merely ministerial and governed by the law as it exists at the time those duties are required to be performed.

By the provisions of Section 28 of Article III of the Constitution of Florida, a bill passed by the Legislature and presented to and vetoed by the Governor after the final adjournment of the session at which the same was passed and within the time therein allowed for the exercise of such veto power, does not become a law until regularly passed over the Governor's veto at its next session.

Obviously, therefore, you would have neither authority nor duty to hold up or postpone the distribution of the gas tax moneys, pending the further action of the Legislature on the said vetoed bills.

In other words, it is your duty to continue to perform your duties in respect to the distribution of the gas tax moneys under existing law, until the method and manner of the performance of such duties have been changed by the Legislature by the repeal or amendment of such existing law or the substitution of other statutory methods therefor.

SECTION 3

Taxation — Documentary Stamp Tax

March 15, 1940—O-760.

AMOUNT AND MANNER OF PAYMENT

Dear Sir:

This is in reply to your letter of March 13 in regard to the suggestion of Messrs. Price and Zaring concerning the amount and manner of payment of documentary stamp tax on a 99-year lease which is subject to termination from three to five years for the failure to erect a building.

I know of no authority by statute, or otherwise, to adopt their suggestion that the tax be paid and stamps affixed for the rent payable during the first three or five years and that an amount of stamps computed according to the agreed rent for the remainder of the lease period be loosely affixed but not cancelled so that they could be removed or sold on failure to erect the building as agreed.

The Act of 1931 contemplates payment, cancellation and affixation of the stamps at the time the instrument is delivered and becomes effective and the tax is based upon the amount of the obligation to pay money evidenced by the instrument. The termination of a lease by default in performance of a covenant to erect a building would seem to be no different than the termination of a lease for failure to pay rent or for non-performance of some other covenant, yet in such a case the tax would be payable and stamps should be affixed and cancelled at the time.

I assume in making this observation that the lease involved becomes immediately effective subject to termination upon non-performance of a covenant in the nature of a condition subsequent.

If the lease is drawn so as to be effective for three or five years, but so that it may be renewed or extended at the end of one of such periods upon erection of the building, the result might be different.

In this situation it seems to me that it should be incumbent upon the lessor to show by provisions of the lease and by legal authorities that a part of the tax and cancellation of stamps therefor are not payable or required, but may be deferred. Therefore, I suggest that a final decision be held in abeyance pending further development of these suggestions by the lessor's attorneys.

March 22, 1939—O-135.

BUILDING AND LOAN ASSOCIATIONS ARE TAXABLE
FOR CONTRACTS FOR DEEDS*Dear Sir:*

I am in receipt of your letter of March 8, enclosing a copy of a letter from Mr. C. D. Rinehart, requesting an opinion as to whether or not contracts

TAXATION — Documentary Stamp Tax

for deeds executed by a building and loan association on lands which they own should be assessed under the Documentary Stamp Act—Chapter 15787, Laws of Florida, Acts of 1931. Part of Schedule A of said Act provides as follows:

"On promissory notes, non-negotiable notes, written obligations to pay money, assignment of salaries, wages, or other compensation, made, executed, delivered, sold, transferred, or assigned in the State of Florida, and for each renewal of the same on each \$100.00 of the indebtedness or obligation evidenced thereby, 10 cents. Mortgages which incorporate the certificate of indebtedness, not otherwise shown in separate instruments, are subject to the same tax at the same rate."

Section 3 of Chapter 15908, Laws of Florida, 1933, in part provides as follows:

"All notes, bonds, mortgages, or shares of stock shall be exempted from the provisions of Chapter 15787 and 15789, Laws of Florida, 1931."

A contract for deed to land owned by a building and loan association is not specifically exempted from taxation under the Documentary Stamp Act and the rule is a statute exempting from taxation should receive a strict construction and no property should be held exempt unless clearly within its terms. *Rast v. Hulvey*, 77 Fla. 74, 80 So. 750.

There is no decision of the courts on this question, and it is my opinion that since contracts for deeds to lands owned by building and loan associations are not specifically exempted by Chapter 15908, these contracts, although they are owned by such building and loan associations, should be taxed.

December 16, 1940—O-1021.

**WHETHER OR NOT RENEWAL OF NOTE BY ADDITIONAL SALES
REQUIRES ADDITIONAL DOCUMENTARY STAMP**

Dear Sir:

I am in receipt of your letter of the 13th instant, in which you enclose a form of note used by the Goodyear Tire & Rubber Company in the State of Florida in connection with their installment sales of tires and other merchandise. It appears from this form that it is a note and an agreement, whereby the purchaser promises to pay to the vendor a certain sum of money, which note covers the purchase price of itemized merchandise purchased from the vendor. On the reverse side of the note there is a supplemental agreement to be used if additional merchandise is purchased, which embodies the terms of the original note and agreement by reference, to cover the additional merchandise purchased. This supplemental agreement is signed by the purchaser of the goods and is under seal, and is merely a renewal of the original note. You ask my opinion as to whether or not when this supplemental agreement is

TAXATION — Documentary Stamp Tax

signed to cover additional merchandise purchased, should another documentary stamp be placed on the instrument to cover the new amount.

Section 1279 (111), Compiled General Laws, Supplement, provides in part as follows:

"On promissory notes, non-negotiable notes, written obligations to pay money, assignments of salaries, wages, or other compensation, made, executed, delivered, sold, transferred, or assigned in the State of Florida, and for each renewal of the same on each one hundred dollars of the indebtedness or obligation evidenced thereby, ten cents. Mortgages which incorporate the certificate of indebtedness, not otherwise shown in separate instruments, are subject to the same tax at the same rate."

You will see that this Section requires documentary stamps to be placed upon any instrument which is a renewal of any of the instruments therein mentioned, and the instrument above referred to is surely a promissory note and/or a written obligation to pay money, which is also embodied in the supplemental agreement.

In my opinion, when the supplemental agreement is executed, embodying by reference the original note and agreement, and is signed by the purchaser, this constitutes a renewal of the terms of the original note, and requires that a new documentary stamp be placed on the agreement, the same as if a completely new instrument had been executed.

The purchaser, by signing the supplemental agreement, does everything which the Supreme Court in the case of *Lee, Comptroller, v. Quincy State Bank, et al.*, 173 So. 909, said should be done to constitute a renewal of a note.

SECTION 4

Taxation — Exemptions

January 19, 1939—O-10.

HOMESTEAD EXEMPTION AMENDMENT—CONSTRUCTION OF
SECTION 7, ARTICLE X, OF THE CONSTITUTION*Dear Sir:*

This will acknowledge receipt of your letter of recent date requesting my interpretation of the Amendment to Section 7 of Article X of the Constitution, adopted at the General Election on November 8, 1938, as applied to the circumstances and conditions as set forth in the eighteen questions submitted by you. I am also in receipt of a letter from Mr. A. W. Cockrell, Jr., Jacksonville, Florida, propounding certain questions that seem to be covered by the ones that you have submitted, and a letter addressed to you from Mr. A. H. St. Johns, Tax Assessor of Duval County, Florida, requesting advice upon a number of questions that he has set forth therein that I believe to be covered also by your questions.

I, therefore, shall limit my answers to the questions contained in your letter, but if, for any reason, I have not covered all of the questions, I shall be glad to answer any further ones that you may care to submit.

In my study of the questions propounded by you and of my reply thereto, I have carefully considered every word in the amendment and have taken into consideration Chapter 17050, Acts of the 1935 session of the Legislature, and have examined the House and Senate Journals of 1937 in an endeavor to have before me all applicable information that would be of assistance to me in determining the intention of the framers of this amendment.

However, I have not allowed my reasoning to be wholly influenced by the information so reviewed, but have also taken into consideration the history of the exemption laws of this State in its passage and adoption, and also the intent of the Legislature and of the people who voted for such Amendment. In ascertaining such intent in construing this Amendment, I have preferred to adopt the ordinary rather than the technical meaning of its words wherever there might be a difference in meaning, believing such meaning to best convey the intent of the electorate.

Before going seriatim into each question, I shall set forth the history of this amendment as it appears in the House and Senate Journals of 1937.

On April 12, 1937, there was introduced Senate Joint Resolution No. 139, which would have submitted to the people of Florida the following amendment to Section 7, Article X, of the Constitution:

"Section 7. There shall be exempted from all taxation, other than special assessments for benefits, to every bona fide resident home owner as defined by the laws of the State of Florida, the homestead as defined in Article X of the Constitution of the State of Florida up to the assessed valuation of

TAXATION — Exemptions

\$5,000.00; provided, however, that the title to the said homestead may be vested in the head of the family, or in his lawful wife, or in both, or in any person defined by the laws of the State of Florida as being a home owner entitled to the benefits of this Section, residing upon such homestead. Provided, further, that the benefits of this amended Section and Article shall inure to the benefit of such persons as have been defined by law to be entitled hereto by any Act, or Acts, of the Legislature enacted at the 1935 and/or 1937 sessions of the Legislature, which Act or Acts, as so enacted shall be deemed to have been ratified, validated and confirmed by virtue of the ratification and approval of this amended Section and Article." See page 29, Journal of the Senate, 1937.

This proposed amendment never passed the Senate and was, therefore, never submitted to the House.

On April 8, Senator Rose introduced Senate Joint Resolution No. 21, proposing an amendment of Section 7, Article X, of the Constitution to be submitted to the people. I quote the same:

"Every person who has the legal title or beneficial title in equity to real property in this State and who resides thereon and in good faith makes the same his or her permanent home, or the permanent home of another or others legally or naturally dependent upon said person, shall be entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed valuation of Five Thousand Dollars on the said home and contiguous real property for the year 1938 and thereafter. Said title may be held by the entireties, jointly, or in common with others, and said exemption may be apportioned among such of the owners as shall reside thereon, as the respective interests shall appear, but no such exemption of more than Five Thousand Dollars shall be allowed to any one person or on any one dwelling house, nor shall the amount of the exemption allowed any person exceed the proportionate assessed valuation based on the interest owned by such person. The Legislature may prescribe appropriate and reasonable laws regulating the manner of establishing the right to said exemption. Provided, however, all of the provisions hereof shall be self-executing without any action by the Legislature." See page 18, Journal of the Senate, 1937.

This duly passed the Senate and was sent to the House.

The House, on May 19, 1937, when the amendment was up for consideration, in Section 2, line 3, struck out the words after permanent home and inserted the following: "and for home purposes only," and as amended it passed the House. See page 872, Journal of the House, 1937.

On the same day, a motion was made to reconsider the vote by which the Senate resolution was passed. This motion went over under the rules until Thursday, May 20. See page 873, Journal of the House, 1937. On May 20, it was informally passed until a later date. See page 906, Journal of the House, 1937. On May 26, the House in due course finally took up the motion to reconsider and the House voted to reconsider its prior vote on said Senate

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Joint Resolution No. 21, and did thereafter adopt the amendment in the form as submitted to the Senate on May 27, 1937. See page 1181, Journal of the House, 1937.

On May 27, 1937, the proposed Senate Joint Resolution No. 21, as amended by the House, was presented to the Senate. It read as follows:

"Every person who has the legal title or beneficial title in equity to real property in this State and who resides thereon and in good faith makes the same his or her permanent home, or the permanent home of another or others legally or naturally dependent upon said person, shall be entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed valuation of Five Thousand Dollars on the said home and contiguous real property for the year 1938 and thereafter. Said title may be held by the entireties, jointly or in common with others, and said exemption may be apportioned among such of the owners as shall reside thereon, as their respective interests shall appear but no such exemption of more than Five Thousand Dollars shall be allowed to any one person or on any one dwelling house, nor shall the amount of the exemption allowed any person exceed the proportionate assessed valuation based on the interest owned by such person. The Legislature may prescribe appropriate and reasonable laws regulating the manner of establishing the right to said exemption. Provided, however, all of the provisions hereof shall be self-executing without any action by the Legislature." See page 824, Journal of the Senate, 1937.

The Senate did not concur in the Resolution as amended by the House and a conference committee was duly appointed by both the House and the Senate.

On June 4, 1937, the Conference Committee recommended the passage of Senate Joint Resolution No. 21 in the following form:

"Every person who has the legal title or beneficial title in equity to real property in this State and who resides thereon and in good faith makes the same his or her permanent home, or the permanent home of another or others legally or naturally dependent upon said person, shall be entitled to an exemption from all taxation except for assessments for special benefits, up to the assessed valuation of Five Thousand Dollars on the said home and contiguous real property, as defined in Article X, Section 1, of the Constitution, for the year 1939 and thereafter. Said title may be held by the entireties, jointly, or in common with others, and said exemption may be apportioned among such of the owners as shall reside thereon, as their respective interests shall appear, but no such exemption of more than Five Thousand Dollars shall be allowed to any one person or on any one dwelling house, nor shall the amount of the exemption allowed any person exceed the proportionate assessed valuation based on the interest owned by such person. The Legislature may prescribe appropriate and reasonable laws regulating the manner of establishing the right to said exemption." See page 1216, Journal of the Senate, 1937.

This identical resolution was also submitted to the House and both bodies

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duly passed the resolution in the above form, and it was, therefore, submitted to the people at the last General Election in November, 1938, and by an overwhelming vote of the people became a part of the Constitution of the State of Florida.

It therefore, appears from the history of this amendment that it was the intention of the framers of the same and the people of the State of Florida, to exempt from taxation up to Five Thousand Dollars, "every person who has the legal title or beneficial title in equity to real property in this State and who resides thereon and in good faith makes the same his or her permanent home, or the permanent home of another or others legally or naturally dependent upon said person."

QUESTION No. 1. Is the amendment self-executing or does the last sentence thereof restrain its operation until such time as the Legislature may prescribe the manner of establishing the right to the exemption?

As I have hereinabove set forth, the resolution as first introduced in the Senate contained this proviso: "Provided, however, all of the provisions hereof shall be self-executing without any action by the Legislature."

You will note that this clause was omitted from the proposed amendment as finally submitted to the voters of Florida. As to why this was done, there is no information contained in the record of the proceedings of the House and Senate, nor did the general public, as such, have any knowledge that this provision had either been proposed or eliminated from the amendment as submitted to them.

There was at that time on the statute books, Chapter 17060, Acts of the 1935 Legislature, which Act regulated the allowance of exemptions of homesteads from taxation and provided some exemptions that there was some doubt about as to whether they had been covered by the previous homestead exemption amendment to the Constitution. The exemptions provided in this Act are very similar to the Amendment to Section 7, Article 10, of the Constitution, as approved by the people in November, 1938. However, the manner of establishing the right to said exemptions was set forth in Chapter 17969, and this, of course, was not in the Amendment to the Constitution as approved in November, 1938.

I do not believe, however, that such a proviso is of material moment, as the right is clearly set forth in the amendment.

The rule of construction as to whether or not a provision of the Constitution is self-executing is well set forth in Cooley's Constitutional Limitations, Eighth Edition, 165, et seq. I quote in part therefrom:

"A constitutional provision does not lose its self-executing quality merely because it provides that the Legislature shall by appropriate legislation provide for carrying it into effect." Text page 170.

The author further says:

"But where, as in some other States, the Constitution defines the extent, in

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acres or amount, that shall be deemed to constitute a homestead, and expressly exempts from any forced sale what is thus defined, a rule is prescribed which is capable of enforcement. Perhaps even in such cases, legislation may be desirable, by way of providing convenient remedies for the protection of the right secured, or of regulating the claim of the right so that its exact limits may be known and understood; but all such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it. The provision of a Constitution which defines a homestead and exempts it from forced sale is self-executing, at least to this extent, that, though it may admit of supplementary legislation in particulars where in itself it is not as complete as may be desirable, it will override and nullify whatever legislation, either prior or subsequent, would defeat or limit the homestead which is thus defined and secured." Text page 170, et seq.

It is significant that in the last paragraph in the amendment, the word "may" was used rather than the word "shall." This paragraph reads:

"The Legislature *may* prescribe appropriate and reasonable laws regulating the manner of establishing the right to said exemption." (Italics ours.)

I think the word "may" was advisedly used since Chapter 17060, Acts of 1935, already on the statute books, rendered unnecessary further legislation to make the amendment operative. The paragraph, however, expressly permits further legislation upon the subject.

QUESTION No. 2: If legislative action is necessary, pending such action, should the tax assessor proceed in preparing the 1939 roll as now provided by Chapter 17060?

No. Legislative action is unnecessary and Chapter 17060 may be referred to in determining the manner of establishing the right to said exemption.

QUESTION No. 3: Does "every person" as used in the amendment mean that single persons, minors, aliens and others who own their permanent places of residence in the State, are entitled to the exemption in question?

I do not believe it would be proper to separate the words "every person" from the remaining words of the sentence as contained in the amendment in order to determine the meaning of those words. I am of the opinion that "every person" does mean a single person, a minor, an alien, or any other person who has "the legal title or beneficial title in equity to real property in this State and *who resides thereon and in good faith makes the same his or her permanent home.*"

I base my opinion as to the right as applicable to aliens upon Section 18 of the Declaration of Rights of the Constitution of Florida, which reads:

"Sec. 18. Foreigners who are eligible to become citizens of the United States under the provisions of the laws and treaties of the United States shall have the same rights as to the ownership, inheritance and disposition of property in the State as citizens of the State, but the Legislature shall have power

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to limit, regulate and prohibit the ownership, inheritance, disposition, possession and enjoyment of real estate in the State of Florida by foreigners who are not eligible to become citizens of the United States under the provisions of the laws and treaties of the United States."

You will note that the Senate did not approve Senate Joint Resolution No. 139, introduced on April 12, 1937, which proposed amendment has been heretofore set out. This amendment would have restricted the meaning of this language, and since same failed to receive the approval of the Senate, this further supports my conclusion.

QUESTION No. 4: Can a citizen of another State, under any circumstances, have a home in Florida which is entitled to the exemption?

I am of the opinion that citizenship is not the test to be applied in determining what persons are entitled to the exemption, but the test to be applied is: Where is their permanent residence?

In order to determine who are citizens, we would have to refer to Article XIV, Section 1, of the Constitution, which reads:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of *the State wherein they reside.*" (Italics ours.)

Therefore, whoever has the legal title or beneficial title in equity to real property in this State, and who resides thereon and in good faith makes the same his or her permanent home, and denominates this place as his or her home to the exclusion of all other places where he or she may from time to time temporarily reside, is entitled to the exemption.

Also consider with reference to this question, my answers to Questions No. 14 and 15.

QUESTION No. 5: What is necessary to qualify a person under the language, "as shall reside thereon"?

I am of the opinion that the language "as shall reside thereon" means that there must be a dwelling house upon said property in which the owner and his family usually reside. These words are so closely related to what I have said in answer to your Question No. 9 as to what is a dwelling house that I refer you to same in this connection.

QUESTION No. 6: Can more than one owner claim exemption on the same property, and if so, to what extent?

The language of the amendment to me is very clear upon this question. I quote the same:

"Said title may be held by the entireties, jointly, or in common with others, and said exemption may be apportioned among such of the owners as shall reside thereon, as their respective interests shall appear, but no such exemption of more than Five Thousand Dollars shall be allowed to any one person or on any one dwelling house, nor shall the amount of the exemption

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allowed any person exceed the proportionate assessed valuation based on the interest owned by such person."

It is apparent from such language that more than one owner can claim exemption on the same property, but no such exemption of more than Five Thousand Dollars shall be allowed to any one person or any one dwelling house. See *Hill v. First National Bank*, 75 So. 615.

QUESTION No. 7: If more than one owner, or the owner of a partial interest claims exemption will it be necessary for the interest of each partial owner to be separately assessed on the tax roll?

In my opinion it will not be necessary for the interest of each partial owner to be separately assessed on the tax roll. This seems to be the intention that is to be gathered from a consideration of the history of this amendment as I have heretofore set it out, and it seems that this is particularly true in view of the fact that only the owners that reside thereon are entitled to this exemption.

QUESTION No. 8: To what extent can a partial owner claim exemption?

This question is somewhat a continuation of Question No. 7, and the amendment seems to me to be sufficiently clear upon this question. It provides:

"* * * and said exemption may be apportioned among such of the owners *as shall reside thereon*, as their respective interests shall appear, but no such exemption of more than Five Thousand Dollars shall be allowed to any one person or on any one dwelling house, nor shall the amount of the exemption allowed any person exceed the proportionate assessed valuation based on the interest owned by such person." (Italics ours.)

In other words, only the partial owners residing thereon are entitled to any exemption, and if there is more than one, the total exemption to all cannot exceed Five Thousand Dollars on any one dwelling house. The amount of such exemption is to be determined so that same shall not exceed the proportionate assessed valuation based on the interest owned by such person, and as I have said before, if there is more than one person, the total exemption cannot exceed Five Thousand Dollars to all.

QUESTION No. 9: What is a "dwelling house" within the meaning of the term as used in the amendment?

The Supreme Court of Florida in the case of *Smith v. State*, 85 So. 911, in defining the meaning of the words "dwelling house" quoted with approval the following definition from 6 Cyc. 185, which is probably the best definition that could possibly be applied to these words:

"* * * it must be in fact the dwelling house. * * * The character of the house is generally immaterial if it is occupied as a dwelling house, and not merely be suitable or intended for such purpose. * * * If it is so occupied the temporary absence of the occupant will not prevent it from being * * * a dwelling house; * * * although furnished as a dwelling house, (it) loses its

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TAXATION — Exemptions

character as such * * * if the occupant leaves it without the intention to return. Occasionally sleeping in a house is not enough to make it a dwelling house."

The Supreme Court also quotes from Wharton's Criminal Law, paragraph 993, where it is said: "'* * * the dwelling house * * * a house in which the occupier and his family usually reside, or, in other words, dwell and lie in.'"

I believe that this definition is sufficiently non-technical to be used in this instance.

QUESTION No. 10: Where a person owns and has two dwellings on the land embraced in the homestead, under any circumstances are both dwellings entitled to the exemption?

In answering this question I shall assume that the title to the property is in only one person, and I am of the opinion that the amendment should be so construed so as to permit an exemption to the owner where someone also is living in a dwelling house upon the property, that is separate and apart from the dwelling house occupied by the owner, when such occupant of the other dwelling house is legally or naturally dependent upon the owner of the property.

QUESTION No. 11: Does the amendment in any way alter or change your former opinion advising that apartment houses, business houses, or other rental properties located upon the land comprising the homestead are entitled to the exemption, if rents from such rental properties are a part of the means of livelihood of the head of the family?

The former opinion was rendered by my predecessor. However, this amendment would in no wise affect the same.

QUESTION No. 12: Does the language of the amendment allow exemption to the owner of property who does not reside thereon when the property is the permanent home of another, or others legally or naturally dependent upon such owner?

Yes. The language of the amendment is very specific. To paraphrase it, it provides:

"An exemption from all taxation except * * * shall be allowed to every person who has the legal title or beneficial title in equity to real property in this State * * * where it is the permanent home of another or others legally or naturally dependent upon said person."

QUESTION No. 13:—What classes of persons are included in the phrase "legally or naturally dependent upon such owner"?

I am of the opinion that all persons are entitled to claim this exemption where there are other persons legally dependent upon them for support in the sense that the word "legally" there means where they are required by law so to do; such as the duty cast upon the husband by law to support his wife and minor children. Section 5873, Compiled General Laws, 1927, provides for support in certain instances. I quote the same:

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"The children of parents who are unable to support themselves shall be required to make provision for their support."

The words "naturally dependent" as used in the amendment, in my opinion, are persons related by blood to the owner of the property, and who otherwise qualify with the requirements set forth by the Supreme Court of Florida in the case of *Duval v. Hunt, et al.*, 15 So. 876. I quote the pertinent part thereof:

"* * * He must show * * * that he or she was either from the disability of age, or nonage, physical or mental incapacity, coupled with the lack of property means, dependent in fact * * * for support. There must be, when adults claim such dependence, an actual inability to support themselves, and an actual dependence upon some one else for support, coupled with a reasonable expectation of support, or with some reasonable claim to support, from the deceased * * *."

QUESTION No. 14: Can a person be entitled to the exemption when they vote in a county or voting precinct other than the one in which the property is located?

No, a person would not be entitled to the exemption when he votes in a county or precinct other than the one in which the property is located because the amendment provides that the property must be the permanent home of the person who claims the exemption, and in order to vote under Section 248, Compiled General Laws of Florida, 1927, a person can only vote "in the election district in which he or she shall have his or her permanent place of residence," and you could only have your permanent home where you maintained your permanent residence. However, I do not mean to be understood as saying that it is necessary as a prerequisite to obtaining this exemption that you do become a qualified voter. The only exception to this is the provision of the amendment which would permit a person to claim an exemption who owns property upon which someone else occupies the dwelling house as his permanent home where such person is legally or naturally dependent upon the owner thereof. In this instance, I am of the opinion that the owner would be entitled to this exemption regardless of where he votes.

QUESTION No. 15: What is necessary to establish a property as a "permanent home"?

As I have said before, the Legislature has in effect already defined the meaning of the words "permanent home," and I think this explanation of the Legislature should control until same has been changed. I refer you to Section 3, Chapter 17060, Acts of 1935, which provides:

"The words 'resident,' 'residence,' 'permanent residence' and *those of like import*, shall not be construed so as to require continuous physical residence on the property, but mean only that place which the person claiming the exemption may rightfully and in good faith call his or her home *to the exclusion* of all other places where he or she may, from time to time, temporarily reside." (Italics ours.)

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In other words "where he has his true, fixed and permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, or in other language, the place in which he has his fixed habitation without any present intention of moving therefrom," and such claimant must not have immediately prior thereto or subsequently thereafter, claimed an exemption by virtue of having a permanent home elsewhere.

QUESTION No. 16: What constitutes a "beneficial title in equity" as the phrase is used in the amendment?

The general definition of equitable title is: "A right or interest in land which, not having the properties of a legal estate, but merely a right of which courts of equity will take notice, requires the aid of such court to make it available * * * ." 20 C. J. 2304.

Other than giving you this general definition of equitable title, I cannot more specifically answer your question, but will be glad to answer any question at any further time should there be any doubt in your mind.

QUESTION No. 17: Is the former generally accepted definition of the area of a homestead changed in any way by the words "home and contiguous real property" as used in this amendment?

No, for the reason that the amendment specifically provides that same shall be as defined in Article X, Section 1 of the Constitution.

QUESTION No 18: What is meant by the phrase "except for assessments for special benefits"? Note the change in phraseology, the original Section 7 of Article X referring to "special assessments for benefits."

I construe these words to have no difference in meaning than those used in the original Section 7 of Article X of the Constitution.

January 20, 1939—O-9.

HOMESTEAD EXEMPTION AMENDMENT—OWNER AND HOLDER OF A LEASEHOLD INTEREST NOT ENTITLED TO

Dear Sir:

I just received a copy of your letter of December 27 to Honorable J. N. Lummus, Jr., Tax Assessor of Dade County, and have already prepared my interpretation of the new Homestead Exemption Amendment to the Constitution. See my letter dated January 19, 1939.

However, what I said in answer to your Question No. 16 relating to what constitutes a "beneficial title in equity" does not answer the question propounded by Mr. Lummus in his letter to you. The question he submits is whether the owner and holder of a leasehold interest is entitled to a homestead exemption. In my opinion he is not because I am of the opinion that the meaning to be placed upon the person who is entitled to a homestead exemption does not cover a leasehold, since I do not believe that the words "legal title" or "beneficial title in equity" covers same. Furthermore since the

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property is never assessed on the real property tax books to the owner of a leasehold, it would seem to indicate to me further that no exemption could be allowed.

February 17, 1939—O-10-1.

HOMESTEAD EXEMPTION—CLAIM MUST BE FILED ON OR BEFORE APRIL 1ST

Dear Sir:

This will acknowledge receipt of your letter of recent date enclosing a letter from Honorable W. S. Sparkman, Tax Assessor of Hillsborough County, propounding an additional question relative to the interpretation of the Homestead Exemption Amendment. The question he propounds is:

Does Section 5 of Chapter 17060 of 1935 Acts of the Legislature positively prevent any taxpayer obtaining a homestead exemption for any year in which he does not file his claim with the tax assessor on or before April 1 as provided in said section?

In my opinion, Chapter 17060, Acts of 1935, should be used as a guide whenever the same is not in conflict with the 1938 Homestead Exemption Amendment to the Constitution. As Section 5 relating to the time in which the claim must be made is not in conflict with the Homestead Exemption Amendment, I am of the opinion that a taxpayer claiming such exemption should file his claim with the tax assessor on or before April 1 as provided in said Section. It is entirely possible that under some circumstances, a claim made later than that date should be allowed. However, I would prefer to consider such a question only after it arises and in full knowledge of all the facts. But I suggest that in the meantime as much publicity as possible be given to Section 5 in order that taxpayers claiming this exemption may have as much opportunity as possible to file their claims.

February 17, 1939—O-10-1.

HOMESTEAD EXEMPTION—UNRECORDED TITLE

Dear Sir:

This will acknowledge receipt of your letter of January 31 enclosing letter from the Honorable A. H. St. John, Tax Assessor of Duval County, which had thereto attached three copies of land sales contracts or agreements for deed. The following question is submitted:

"Does not the 1937 Constitutional Amendment of Section 7 of the Homestead Article X exempt the permanent home of the resident even though the home owner's legal title or beneficial title in equity be not recorded?"

An examination of the contracts that you submit discloses that they are about the usual forms for contracts of sale of land and they appear to be

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bona fide upon their face. Therefore, the right held by the purchaser comes within the meaning of the language of the Constitution of "legal title or beneficial title in equity." Since the purchaser under such contracts has the title within the meaning of the Constitutional Homestead Amendment, I am of the opinion that the fact that these contracts have not been recorded would not affect the purchaser's right to this exemption provided, of course, that all other essential requirements of the amendment are met.

However, as suggested by Mr. St. John, I think he should require that there be submitted to him at the time the exemption is claimed, the original contract and that he should have attached to his exemption claim an exact copy of the original in order that there may be in the tax assessor's office and in his file upon the particular exemption, the instrument under which the claim is made.

August 23, 1940—O-899.

HOMESTEAD EXEMPTION—RIGHT OF HUSBAND AND WIFE
LIVING SEPARATELY TO CLAIM

Dear Sir:

I have received your letter of August 21 in which you state that "A" and "B," husband and wife, have been separated for some years without divorce and each owns and lives in a house in the same county, and each has applied for homestead exemption for such property, and you ask which is entitled to the exemption.

The Florida courts have long held that a married woman could, under certain circumstances, establish a separate legal residence where she might sue for divorce.

In *Herron v. Passailaigue*, 92 Fla. 818, 110 So. 539, the Court approved a statement of the United States Supreme Court as follows:

"The rule is that she may acquire a separate domicile whenever it is necessary or proper that she should do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues."

If a married woman may acquire a legal residence separate from her husband for the purpose of bringing a suit for divorce, such legal residence would persist so long as she remained there even though her suit for divorce might lie dormant or be defeated upon grounds other than venue, or even though she might never initiate divorce proceedings. *Smith v. Croom*, 7 Fla. 81.

The constitutional provision for homestead exemption (Art. X, Sec. 7) now provides that "every person who has the legal title or beneficial title in equity to real property in this State and who resides thereon and in good faith makes the same his or her permanent home * * * shall be entitled to" the exemption. Previous to the adoption of the present provision, by the Novem-

TAXATION — Exemptions

her, 1938, election, the exemption had been allowed only to the "head of a family" and it is evident by the amendment that the Legislature intended to include every person who was capable, under our law, of acquiring by himself or herself a separate legal residence.

It is, therefore, my opinion that a married woman, who has separated from her husband because of circumstances which would entitle her to a divorce, and has established for herself a separate permanent home which she owns and in which she lives, is entitled to the benefit of the homestead exemption for such property. It will be incumbent upon the tax assessor to whom claim for exemption has been made by a married woman to determine that the separation was caused by acts of the husband and that such acts are grounds upon which the wife would be entitled to a divorce under our laws. This right of the wife does not take away from the husband his right to the exemption upon the property on which he lives and makes his permanent home. Should the husband and wife become reconciled and live together, then, of course, the exemption would be allowed on only the one home in which they live.

June 1, 1939—O-50-1.

WIDOWS OWNING PROPERTY IN STATE

Dear Sir:

I am in receipt of your letter of the 31st, enclosing copy of a letter from J. N. Lumms, Jr., Tax Assessor of Dade County, in which he states he has been allowing widow's exemptions to widows who have legal dependents, upon property owned by them in Dade County, although they reside in other counties of the State. You request my opinion as to whether or not this is proper.

Section 7 of Chapter 18312, Laws of Florida, 1937, provides as follows:

"Property to the value of five hundred dollars to every widow that has a family dependent on her for support, and to every person who is bona fide resident of the State, and has lost a limb or been disabled in war or by misfortune."

Section 9 of Article IX of the Constitution of the State of Florida provides as follows:

"There shall be exempt from taxation property to the value of five hundred dollars to every widow that has a family dependent on her for support, and to every person who is a bona fide resident of the State and has lost a limb or been disabled in war or by misfortune."

You will see from the Constitution and laws of this State that there is no requirement that a widow must reside in the county where she claims her exemption before she is entitled to the exemption provided by the law and the Constitution. It is therefore my opinion that the claims for widow's exemptions of those who have legal dependents must be allowed upon property which

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they own in any one county, although such widows may not reside in that county. Of course, the exemption cannot be allowed except in one county.

July 11, 1939—O-464.

LEASED PROPERTY—CITY OF JACKSONVILLE NOT EXEMPT

Dear Sir:

I am in receipt of your letter of the 8th, requesting my opinion as to whether or not certain property leased by the City of Jacksonville from the New York Life Insurance Company should be exempt from ad valorem taxes. Your letter also encloses a letter from Mr. A. H. St. Johns, Tax Assessor of Duval County, which encloses a letter from Gov. Hutchinson, City Solicitor of Jacksonville, a letter from Alston Cockrell, and a lease between the New York Life Insurance Company and the City of Jacksonville. It appears from these papers that the City of Jacksonville leased on October 15, 1938, a part of a certain building situated on the northeast corner of Laura and Duval Streets in said city for certain considerations. It appears that this lease is for a term of ten years but that it may be terminated by the lessor upon payment of certain sums at any time after five years, and that the lease may also be terminated upon thirty days' notice by the lessor upon the City of Jacksonville breaching any of the covenants made in the lease. It further appears from the lease that certain valuable parts of the building rented for stores on the ground floor are excepted from the lease and that this portion of the building is being rented to third parties by the lessor. Mr. St. Johns' letter reveals that this property is sub-leased by the City of Jacksonville either rent-free or for a consideration to the Works Progress Administration. The lease also provides that the City of Jacksonville shall pay or cause to be cancelled the taxes on this property during the term of the lease.

The statute under which the City of Jacksonville is claiming that this property is exempt is Section 897, Compiled General Laws, 1927, Supplement, and is as follows:

"The following property shall be exempt from taxation: First, all property, real and personal, of the United States and of this State.

"Second—All public property of the several counties, cities, villages, towns and school districts in this State, used or intended for public purposes, including both real and personal property of all fire, hose and hook and ladder companies, except lands sold for taxes for the use of any counties, cities, villages, towns or school districts.

It is my opinion that this statute means that before a municipal corporation can claim exemption of taxes under this section that it not only must own the property but that the property must be used for public purposes. In this connection see the case of *City of Eugene v. Keeney, County Assessor*, 293 Pac. 924, where the Supreme Court of Oregon, in construing a similar statute, said:

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"The following property shall be exempt from taxation: * * * 2. All public or corporate property of the several * * * cities * * * used or intended for corporate purposes, except lands belonging to such public corporations held under a contract for the purchase thereof."

"It is plain from a consideration of the above statute that the exemption from taxation was not made to depend solely upon ownership of the property. Some significance and meaning must be given to the words 'used or intended for corporate purposes.' It is also clear that, if the property owned by a municipality is not used or intended to be used for a corporate purpose, it is subject to taxation. This plain implication follows by reason of the fact that the Legislature specifically provided in what instances municipally owned property should be exempt from taxation. The decision of the case, therefore, hinges upon the question whether the city of Eugene has used, or intends to use, this property for corporate purposes. In view of the record before us, we must answer this question in the negative. The plaintiff having leased this property to the town of Springfield for a period of 49 years, it is hardly reasonable to assume that the city of Eugene intends to devote this property to a public use. It has virtually placed the land beyond its control or management, notwithstanding it still retains the legal title thereto. Springfield has a 'Free Industrial Site,' but we cannot say that the tract is being used in keeping with the intendment of the charter amendment authorizing the bond issue. Certainly Eugene is not so using it—nor is there reasonable inference which we can deduce from the record that the plaintiff intends so to use it."

Here the City of Jacksonville is not using the property for a public purpose. The W. P. A. is using the property for a public purpose, if that be a public purpose as contemplated by the Constitution and laws of the State of Florida. For other cases on this point see *People v. City of Toulon*, 133 N. E. 707; *People v. City of Chicago*, 153 N. E. 725.

In the case of *University Club v. Lanier*, 119 Fla. 146, 161 So. 78, our Supreme Court held:

"Only property which is held and used *exclusively* for municipal purposes is exempt from taxation."

It appears from the lease that this property is not used exclusively for municipal or public purposes but that a very valuable part of the property is used for private purposes. In the case of *Rast v. Hulvey*, 77 Fla. 74, 80 So. 750, our Court held:

"Under the law all real and personal property in the State, not expressly exempted therefrom, is subject to taxation, and all laws exempting property from taxation should receive a strict construction, and no property should be held to be within the exemption, unless it is clearly within the terms of the statute granting immunity from taxation."

Construing this statute strictly, as our Court has said it should be construed, before a municipality is entitled to exemption of property from taxa-

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tion, it must own the property and it must use the property exclusively for public purposes. It appears from the file in this case that this property does not meet either of these requirements and it is therefore my opinion that the City of Jacksonville is not entitled to any exemption on any of this property.

August 16, 1939.—O-545.

**DISABLED WAR VETERANS NOT EXEMPT AS DEALERS IN
SEA FOODS UNDER CHAPTER 19611**

Dear Sir:

I have your letter of the 12th instant referring to Chapter 17476, Laws of Florida, Acts of 1935, which is an Act to amend Chapter 12110, Acts of 1927, exempting disabled veterans of the World War and Spanish American War from the payment of an occupational tax.

You also refer to House Bill No. 1003, Chapter 19611, Laws of Florida, Acts of 1939, which is an Act relating to and regulating dealing in sea foods and salt water products; requiring certain permits and imposing license taxes, and providing conditions governing the issuance thereof, and providing for the collection and disposition of the proceeds thereof; defining and regulating wholesale sea food dealers and retail sea food dealers; providing for certain exemptions and repealing conflicting laws, etc.

You also refer to a ruling of my predecessor under date of July 27, 1937, holding that there was no exemption of any person, including veterans, from the license required of dealers under the Conservation Act, Chapter 17914 of 1937.

Reference is also made to Section 1836, Compiled General Laws of Florida, 1927, under Article XIX, relating to salt water fisheries, which section reads as follows:

"The licenses provided by this section being police licenses exacted by the State in the control of her own property, over which a police control is necessary, no county, city, town or municipality shall impose any further license tax than herein provided. This provision does not, however, prevent State, county and municipal tax on personalty and realty as now provided by law."

After reference to the above laws, you make inquiry if veterans are exempt from the payment of wholesale and retail licenses required under said Chapter 19611, Acts of 1939, relating to sea food dealers.

Occupational taxes or licenses are enumerated and set forth in the general statutes and are assessed and collected for general State and county purposes.

By reference to Section 1 of said Chapter 19611, Acts of 1939, you will note the licenses required of wholesale and retail dealers in sea foods are issued by the Supervisor of Conservation and upon application to that officer, and that the proceeds are required to be deposited in the State Treasury to the

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credit of the Conservation Fund for the use of the Conservation Department. It, therefore, appears that payment for such licenses are not in the nature of occupational licenses but are in the nature of fees required to assist in the maintenance of the Conservation Department.

You will note also that the title of said Chapter 19611, Acts of 1939, specifically recites "provided certain exemptions." The only exemptions provided in the Act relate to persons catching or taking sea foods without the use of seines, nets, traps or other methods other than hook and line fishing or gathering such other products by hand and selling their own catch and to retail merchants paying the license imposed by law upon dealers in merchandise, who deal in or sell only salt, cured, or canned fish or sea foods.

In view of the above, it is my opinion that there are no exemptions from the payment of dealers' licenses provided for under said Chapter 19611 other than as specifically mentioned in said Act and above enumerated.

SUPPLEMENT

Section 35, Chapter 18011, Laws of Florida, Acts of 1937, now Section 1279 (36), Compiled General Laws of Florida, Permanent Supplement, Pocket Edition of 1938:

"Other License Fees Declared To Be in Addition to Occupation License Tax.—Fees or licenses paid to any board, commission or officer for permits, registration, examination, inspection or other regulatory purposes shall be in addition to and not in lieu of any occupation license tax required by this law or other law unless otherwise expressly provided by law."

The above Section is a part of the occupational license statutes and directly supports the foregoing opinion.

September 27, 1939—O-580.

WAR VETERANS NOT EXEMPT FROM PAYMENT OF REGISTRATION FEE UNDER FLORIDA PURE SEED LABELING LAW, CHAPTER 19364, ACTS OF 1939

Dear Sir:

I have your letter of the 23rd instant making inquiry whether the registration fee required of seed dealers by the Florida Pure Seed Labeling Law is collectable from war veterans.

Chapter 17476, Laws of Florida, Acts of 1935, amending Chapter 12110, Acts of 1927, is the statute relating to exemption of veterans of the World War and Spanish American War from the payment of an occupation tax. Title to said Chapter 17476 reads as follows:

"An Act to Amend Chapter 12110, Acts of 1927, Laws of Florida, Entitled: 'An Act to Exempt Disabled Veterans of the World War and Spanish-American War from the Payment of an Occupation Tax in the State of

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Florida, and to Provide the Manner in which Such Exemption Shall Be Allowed' as amended by Chapter 13876, Acts of 1929, Laws of Florida, and as further amended by Chapter 16299, Acts of 1933, Laws of Florida."

The title to Chapter 19364, Acts of 1939, known as the Florida Pure Seed Labeling Law, reads as follows:

"An Act To Provide for the Inspection, Testing and Labeling of Field, Vegetable and Grass Seeds Intended for Propagation Purposes, and To Prevent the Introduction Into and the Sale Within this State of Same When Misbranded, Adulterated, or of Inferior Quality; to Require a Seedsman's Registration, to Create a Seed Inspection Bureau Under the Commissioner of Agriculture and to Prescribe Its Powers and Duties Thereunder; to Authorize the Establishment of a Seed Laboratory; to *Authorize the Collection of Fees for Inspection, These Fees to Constitute an Operating Fund To Be Used Towards Defraying Costs of Administration.*"

Section 16 of said Chapter 19364 reads as follows:

"All funds collected or accruing to the Commissioner under this Act shall be placed in the General Inspection Fund, for the use of the Commissioner in carrying out the provisions of this Act and to be expended by him upon proper vouchers, and a detailed report of all collections and expenditures made hereunder shall be made to the Governor at the end of each fiscal year."

The exemption of veterans under Chapter 17476, Acts of 1935, relates to general occupation license taxes. Occupational taxes or licenses are enumerated and set forth in the general statutes and are assessed and collected for general State and county governmental purposes. The registration fees required of said seed dealers under Chapter 19364 of 1939 are not in the nature of occupational licenses and the proceeds of such registration fees are by the title and the body of the Act required to be used as an operating fund to defray the cost of the administration of said statutes.

In view of the above and the further fact that the said statute does not provide for any exemptions, it is my opinion that you are not authorized to allow any exemptions under said Act.

SUPPLEMENT

Section 35, Chapter 18011, Laws of Florida, Acts of 1937, now Section 1279 (36), Compiled General Laws of Florida, Permanent Supplement, Pocket Edition of 1938:

"Other License Fees Declared To Be in Addition to Occupation License Tax.—Fees or licenses paid to any board, commission or officer for permits, registration, examination, inspection or other regulatory purposes shall be in addition to and not in lieu of any occupation license tax required by this law or other law unless otherwise expressly provided by law."

The above Section is a part of the occupational license statutes and directly supports the foregoing opinion.

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September 27, 1939—O-579.

**WORLD WAR AND SPANISH-AMERICAN WAR VETERANS NOT
EXEMPT FROM PAYMENT OF FEES REQUIRED UNDER
HOTEL COMMISSION LAW***Dear Sir:*

I have your letter of the 26th instant making inquiry with reference to exemption of World War and Spanish-American War veterans from the payment of licenses to operate hotels, apartments, rooming houses and restaurants in this State.

Chapter 12110, Acts of 1929, as amended by Chapter 17476, Acts of 1935, is the statute relating to exemptions of World War and Spanish-American War veterans from the payment of occupational licenses. Occupational taxes or licenses are enumerated and set forth in the general statutes and are assessed and collected for general State and county governmental purposes.

The statutes relating to the Hotel Commission are Sections 243 and 247 and Sections 3353 to 3385, Compiled General Laws of Florida, Permanent Supplement.

Section 3355 provides for operators of hotels, apartment houses, rooming houses or restaurants to procure a license.

Section 3376 provides for the Hotel Commissioner to appoint and employ such office help, traveling inspectors and supervising architects as are necessary to carry out the provisions of the law.

Section 3380 appropriates the amount paid for licenses and fees for the purposes of the Act. It, therefore, appears that such licenses are not in the nature of occupational licenses but are in the nature of fees required for administration of the Hotel Commission. I find no exemptions to World War and Spanish-American War veterans among the Hotel Commission statutes.

In view of the above, it is my opinion that there are no exemptions to World War and Spanish-American War veterans from the payment of the fees required under the Hotel Commission law.

SUPPLEMENT

Section 35, Chapter 18011, Laws of Florida, Acts of 1937, now Section 1279 (36), Compiled General Laws of Florida, Permanent Supplement, Pocket Edition of 1938:

"Other License Fees Declared To Be in Addition to Occupation License Tax.—Fees or licenses paid to any board, commission or officer for permits, registration, examination, inspection or other regulatory purposes shall be in addition to and not in lieu of any occupation license tax required by this law or other law unless otherwise expressly provided by law."

The above Section is a part of the occupational license statutes and directly supports the foregoing opinion.

TAXATION — Exemptions

September 27, 1939—O-581.

**WORLD WAR AND SPANISH-AMERICAN WAR VETERANS NOT
EXEMPT FROM PAYMENT OF FEES UNDER GAME
AND FRESH WATER FISH STATUTES***Dear Sir:*

I have your letter of the 15th instant referring to Sections 20, 31, 32, 61 and 62 of your pamphlet of Game and Fresh Water Fish statutes, which are the same as Sections 1977 (20), 1977 (31), 1977 (32), 1977 (61) and 1977 (62), respectively, relating to payment of fees for taking fur-bearing animals; engaging in the business of wholesale or retail fish dealer; fees on boats engaged in the fresh water fishing industry; fees to engage in the business of a dealer or buyer in skins and furs; and fees for engaging in the business of renting boats. You make inquiry if World War and Spanish-American War veterans are exempt from the payment of such fees.

Chapter 12110, Acts of 1927, as amended by Chapter 17476, Acts of 1935, is the statute relating to the exemption of such veterans from the payment of occupational licenses. Occupational taxes or licenses are enumerated and set forth in the general statutes and are assessed and collected for general State and county governmental purposes.

The Game and Fresh Water Fish statutes (Sections 1902 to 1977 [89-f], Compiled General Laws of Florida, Permanent Supplement), provide for certain exemptions, but I find no exemptions for World War and Spanish-American War veterans.

Section 1977 (13) provides that the funds resulting from the administration of the Game and Fresh Water Fish Commission shall constitute the State Game Fund and shall be used in carrying out the provisions thereof, and for no other purpose. The fees required under the Game and Fresh Water Fish statutes do not appear to be in the nature of occupational licenses, but are in the nature of fees required to maintain the Game and Fresh Water Fish Commission in the administration of the particular statute relating to game and fresh water fish.

In view of the above, it is my opinion that there are no exemptions to World War and Spanish-American War veterans from the payment of the license fees required under said statutes.

SUPPLEMENT

Section 35, Chapter 18011, Laws of Florida, Acts of 1937, now Section 1279 (36), Compiled General Laws of Florida, Permanent Supplement, Pocket Edition of 1938:

"Other License Fees Declared To Be in Addition to Occupation License Tax.—Fees or licenses paid to any board, commission or officer for permits, registration, examination, inspection or other regulatory purposes shall be in

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addition to and not in lieu of any occupation license tax required by this law or other law unless otherwise expressly provided by law."

The above Section is a part of the occupational license statutes and directly supports the foregoing opinion.

October 2, 1939—O-591.

**RURAL ELECTRIFICATION COOPERATIVES NOT EXEMPT
UNDER CHAPTER 19136**

Dear Sir:

I am in receipt of your letter of the 26th, in which you inquire as follows:

"Will you please advise me if Rural Electrification Lines which have been constructed by cooperatives through loans from the Federal Government are subject to assessment for taxes?"

In reply thereto, I would state that Chapter 19138, Laws of Florida, 1939, does not exempt rural electrification cooperatives from the payment of either excise or ad valorem taxes. The provisions for the exemption from excise taxes were stricken from the Act before it was passed, although mention of this exemption is contained in the title of the Act. I find no other statute exempting these cooperatives from taxation, and therefore it is my opinion that such cooperatives are subject to assessment for taxation.

October 3, 1939—O-614.

BONDS, SPECIAL TAX SCHOOL DISTRICT—WHEN EXEMPT

Dear Sir:

In your letter of the 2nd instant you ask to be advised whether property exempt from taxation under recent constitutional amendment will be subject to special tax school district bonds, where an election was held authorizing the issuance of bonds prior to the election ratifying such constitutional amendment, although the bonds were not actually issued and sold until after such election.

I assume, of course, that you refer to the Homestead Exemption Amendment, which is Section 7 of Article X of the Constitution. It is my opinion that homesteads are not subject to taxation for the payment of bonds issued and sold, subsequent to the adoption of the constitutional amendment exempting homesteads from taxation, although the issuance of such bonds was authorized by an election held prior to the election at which said constitutional amendment was adopted. Apparently this question has not been decided by our Supreme Court.

In *Yowell, et al., v. Rogers, et ux.*, 128 Fla. 881, 175 So. 772, the Court said:

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"This Court has repeatedly held that homesteads are taxable for debt service as to bonded indebtedness existing at the time of the adoption of the Exemption Amendment."

The indebtedness evidenced by bonds does not exist until the bonds are sold and delivered, and I assume that the converse of the quoted holding would be true where the indebtedness evidenced by the bonds was created subsequent to the adoption of the exemption amendment.

November 22, 1939—O-661.

PERSON ENTITLED TO EXEMPTION UNDER SECTION 9 OF
ARTICLE X OF THE CONSTITUTION IF LANDS
HAVE VESTED IN STATE OF FLORIDA
UNDER CHAPTER 18296

Dear Sir:

I am in receipt of your letter of the 17th in which you inquire as to whether or not a person entitled to an exemption under Section 9 of Article IX of the Constitution of the State of Florida, but who failed to apply for said exemption, can claim it, despite the fact that the lands upon which he claims the exemption have vested in the State of Florida under Section 9 of Chapter 18296. In reply to this question I would state that Section 9 of Article IX provides as follows:

"Section 9. There shall be exempt from taxation property to the value of five hundred dollars to every widow that has a family dependent on her for support, and to every person who is a bona fide resident of the State and has lost a limb or been disabled in war or by misfortune."

The Constitution is the supreme law of the land, and this Section allows exemption to certain persons, regardless of whether or not any application is made therefor. It is, therefore, my opinion that a person entitled to an exemption under this Section of the Constitution could claim the same upon lands which have vested in the State of Florida under Section 9 of Chapter 18296, Laws of Florida, 1937, provided the total assessed value of the land is not more than \$500.00, regardless of whether or not an application was made for the exemption, provided satisfactory proof is made to you that the person claiming the exemption was entitled to the same for all the years in which the exemption is claimed, and provided further, that satisfactory proof is made that this exemption was not used to exempt other property in the State of Florida owned by the claimant for the years in which the exemption is claimed.

It is my further opinion that you have authority to cancel the certificate issued against said property after the proof above set out is made under Section 1009, C. G. L. 1927, and that it will not be necessary to obtain a quit claim deed from the State of Florida or from the Trustees of the Internal Improvement Fund in order to clear the title of the delinquent taxes.

TAXATION — Exemptions

May 13, 1940—O-804.

**UNIMPROVED CHURCH PROPERTY UNDER SECTION 16,
ARTICLE XVI, CONSTITUTION***Dear Sir:*

Your letter of May 11, 1940, asking for an interpretation of the recent decision of the Florida Supreme Court in the case of Lummus, et al., v. The Miami Beach Congregational Church (decided April 26, 1940) has been received.

The property involved in the suit was conveyed to appellees with a restriction that it was to "be used for church purposes only," having been bought as the site for a church, the plans of which had been previously prepared. It was originally improved and for several years occupied by assistants to the pastor and used for other church purposes. The case cited may therefore be limited to a decision that demolition of the buildings thereon would not take away the exemption from taxation previously enjoyed by the property so long as no prohibited use was made of it.

It is therefore my opinion that no general instructions to tax assessors throughout the State should be given and each claim for exemption from taxation of church property not in actual use should be decided upon the known facts.

SECTION 5

Taxation — Inheritance Taxes

August 9, 1939—O-527.

CONSTRUCTION OF LAW—CHAPTER 16015 DOES NOT REPEAL
CHAPTER 15747

Dear Sir:

This will acknowledge receipt of your request of recent date propounding the following question:

Does Chapter 16015, Laws of 1933, repeal Chapter 15747, Laws of 1931?

In reply I wish to advise that Chapter 15747 is what is commonly called a Reciprocal Tax Act and it provides that intangibles of a nonresident of the State of Florida will not be taxable by the State if intangibles of residents of the State of Florida are not taxable in the State where decedent had his domicile. In other words, the State of Florida will not tax the intangibles of a nonresident who has intangibles in this State if that State will reciprocate with the State of Florida and will not tax residents of the State of Florida who has intangibles in such other State for the purpose of inheritance taxes.

Chapter 16015, Acts of 1933, does not contain any provision directly repealing the Act that I have above referred to. This Act, in effect, clarified and made more certain the inheritance tax law that was passed in 1931 and I can see no conflict between the two. On the other hand, it seems consistent with logic and reason that each Act can operate in its own field not only without conflict but I am inclined to believe that Chapter 15747, Acts of 1931, will be very helpful in the administration of the 1933 Act.

In this connection I might call your attention to a very recent decision of the Supreme Court of Florida as yet unreported. It is the case of *State ex rel. Myers, Relator, v. Cone, et al.*, decided on the 25th day of July, 1939, wherein the Court said:

"The only question for our determination is whether or not the provisions of Chapter 16178, *supra*, repeal or supersede the provisions of Section 1241 R. G. S., 1799 C. G. L., *supra*. It appears from the wording of the latter Act that the Legislature did not intend to repeal any part of Chapter 6532, Acts of 1913, by implication, but that insofar as the subject matter here is concerned it specifically stated in Section 8 of Chapter 16178, *supra*, what provisions of the former Act, which was Chapter 6532, Acts of 1913, should be repealed or superseded. The provision contained in Section 1241, R. G. S., 1799, C. G. L., which was contained in Section 12 of Chapter 6532, Acts of 1913, is entirely compatible with every provision contained in Sections 2 and 8 of Chapter 16178, *supra*. Therefore, there is a field for the operation of both statutes. If the provisions of Section 1241 R. G. S., 1799 C. G. L., had been inserted in Section 8 of Chapter 16178, such insertion would have created no inconsistency or ambiguity. Therefore, we must hold

TAXATION—Inheritance Taxes

that there was neither a direct nor implied repeal of the quoted provisions of Section 1241 R. G. S., 1799, C. G. L." (*Italics ours.*)

To paraphrase the language of the Court in the instant case, it would read:

Therefore, there is a field for the operation of both statutes. If the provisions of Chapter 15747, Acts of 1931, had been inserted in Chapter 16015, Acts of 1933, such insertion would have created no inconsistency or ambiguity.

The Court cites many other cases in its opinion and it would serve no useful purpose here to review the same in detail because I am firmly of the opinion that Chapter 15747, Acts of 1931, was not repealed by Chapter 16015, Acts of 1933, and that, therefore, Chapter 15747, Acts of 1931, is a valid statute of the State of Florida.

October 9, 1939—O-595.

STATE IS LIABLE FOR FULL VALUE THEREOF WHERE PART
OF THE ASSETS COMPRISING THE ESTATE WAS
PAID FOR BY A DEVISEE

Dear Sir:

I have your oral request for an opinion in the matter of the estate of Benjamin Moore, deceased. You left with me a copy of the brief prepared by the attorney for Mrs. Moore and also a copy of the will. Assuming the facts as set forth in Mrs. Moore's brief to be true and based upon this assumption, briefly they are:

Benjamin Moore, prior to his death, purchased considerable acreage in Jefferson County, Florida, in 1929, with the intention of establishing a private shooting preserve. Later his wife purchased adjacent land and took title in her name. She did this in order that there would be additional land available for hunting purposes. Up to 1937 there was no extensive residence building upon either tract of land. The decedent and his wife formed a plan to erect a substantial residence. Same was to be located upon land, title of which was held by the decedent. His income was insufficient at that time to build the residence they desired. Decedent's wife, from her own funds, agreed to erect a building upon this property, and the decedent was to have no right, title or interest in said improvements, and decedent was supposed to execute all papers necessary to evidence the ownership of such buildings in his wife.

The residence was constructed at a cost of something over \$70,000. Legal title to this property was never conveyed to decedent's wife. He did, on May 10, 1937, execute a lease for a term of twenty years at a nominal consideration, with an option to renew for an additional twenty years for a like consideration. Her counsel now states that under the laws of Florida this instrument is void for the reason that it was not properly witnessed. This

TAXATION—Inheritance Taxes

contention seems to be sustained by Section 5660, Compiled General Laws of Florida.

The only question to determine is since the death of Benjamin Moore, is his estate liable for inheritance taxes upon the full value of said property including the improvements placed thereupon by his wife?

I have carefully read the authorities cited by the attorney for Mrs. Moore and I have no quarrel with the same. They are all to the effect that where one pays for the construction of buildings upon lands of another which was not intended as a gift, that a court of equity would declare that a lien existed for such improvements or that a court of equity would declare a trust in favor of the party who placed said improvements upon said lands to the extent thereof.

Other cases that are cited are to somewhat the same effect and it would serve no useful purpose to review each in detail. Mrs. Moore claims that under the cases, she now "has a claim or demand against the estate of the said Benjamin Moore, deceased, which constitutes a charge upon the said lands for the amount of the present actual value of the improvements placed by her upon the lands of the decedent and paid for by her out of her own funds."

I find that by the Fourth Paragraph of decedent's will, he devised the property involved to his wife, Alexandra E. Moore.

It seems that in arriving at this conclusion, another line of cases has been wholly overlooked and while I have not found a case directly in point, these cases are more analogous to the situation and are more closely on "all fours" with the case under consideration than the ones cited in behalf of Mrs. Moore. I shall now review some of the more important cases that I have in mind.

In the case of *State ex rel. McGill v. Gerhards*, 99 Kan. 462, 162 Pac. 1149, the State filed a petition against Christopher and Susie Gerhards as the sole heirs of Christ Backus for the payment of an inheritance tax alleged to be due on the estate of said Christ Backus. Defendants had purchased the property described in the petition and as a matter of sentiment placed title thereto in the name of Christ Backus. At the time said title was placed in Christ Backus it was understood and agreed between defendants and Backus that said property belonged to the defendants and that at the death of Backus same should be devised to the defendants or title placed in their names. The Court said:

"The defendants have seen fit to take this property under the will, not under a contract nor as *cestui que trust*. The State has the power to tax the right of succession—the right to take by will or by the statute of descents and distributions (*State v. Mollier*, supra, 96 Kan. 519, 152 Pac. 771, L. R. A. 1916C, 551); and since the defendants have chosen to take title by the will of Christ Backus it is of no consequence that they might have secured it through some other mode of acquisition, or through some altogether legal right thereto."

TAXATION—Inheritance Taxes

Applying the reasoning in this case to the present facts it could be argued that title to this property had vested in Mrs. Moore under and by virtue of the will and thereby came to her exclusive of any other method and regardless of the fact that she might establish some rights to the property through legal proceedings the property was still taxable because the tax is based upon the right of the State to tax property that passes by a will.

I might add that some other facts appear from the statements in the brief submitted on behalf of Mrs. Moore to the effect that the decedent intended to convey title to his wife to the property upon which the house was located and certain other property and the reason that he had not done so up to the time of his death, which I understand was very sudden and unexpected, was because he was afraid that he might have to pay a gift tax. Mrs. Moore, of course, feels that she should not have to pay tax upon the full value of property upon which she contributed a large amount of money and improvements as result thereof would, of course, be reflected in its present value, and although as much as we might sympathize with Mrs. Moore in this predicament, we still must be guided by the authorities in determining what her rights are.

In the case of *State v. O'Leary* (Kan.), 61 Pac. (2d) 1325, an action was brought to recover a succession tax on an intestate estate upon which there was no formal administration and which devolved on the two brothers of the deceased intestate as her sole and only heirs. It was held that where the brothers based their title to the property of the estate as heirs, that irrespective of the pleaded defense, the brothers were equally owners of the property with their deceased sister and that she had only held the record title for their common convenience, that the estate is still liable for the tax. The Court said:

"It has been repeatedly held that, when a person claims property as heir or devisee, he must pay the inheritance tax accordingly, irrespective of the fact that he might have lawfully and effectively established his right of ownership thereto by some independent title, by contract, as *cestui que trust*, or otherwise."

As I understand the matter, Mrs. Moore to all intents and purposes, is in possession of this property, claiming the full title thereof under the will of her husband. This may be an assumption upon my part that may not be warranted by the facts. However, up to this time, I have not seen any disclaimer of ownership on behalf of Mrs. Moore.

In the case of *Ransom v. United States* (1879) Fed. Cas. No. 11,574, a devise by a wife to her husband of real estate which had been purchased and paid for by him, but conveyed to her upon the understanding that she should make her will devising the property to him in case she died before he did, was held subject to the tax under the Internal Revenue Act of 1864, which subjected dispositions of real estate by will to a tax. The court states that the fact that the will was made on account of an agreement to that effect

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by the wife when she took her title rendered it none the less an instrument creating a beneficial interest in the husband on her death, and that under the statute, is a succession to be taxed. See Annotation in 7 A. L. R. 1046, 1047.

Now it might be stated that this was not the agreement of the parties in this instance. However, the fact remains that although the will was made by decedent Moore long prior to the expenditure by his wife, that nevertheless, he felt that at his death under his will, it would go to her and that it was not necessary to formally execute a deed, or that this was something that could be done at any time. But, nevertheless, the fact remains that there were no papers formally executed placing the title to this property in the name of Mrs. Moore and that under the will of her husband, the same passed to her in fee simple. This construction is sustained by the documentary evidence and is not wholly at variance with Mrs. Moore's statements of the facts.

A very interesting case is that of *In Matter of Edson*, 56 N. Y. S. 409, 38 App. Div. 19, on rehearing, 54 N. T. 1092, 159 N. Y. 568. The Court in effect held that where a devise in a will is absolute in form and it requires extrinsic evidence to prove that the property was held in trust, the property, nevertheless, passes by the will, is subject to inheritance tax, and the State is not bound by the extrinsic evidence even though in accord with the evidence, equity would impress the property with a trust. See also *Krug v. Douglas County*, 114 Neb. 517, 208 N. W. 665.

In the case of *In Re Grogan's Estate*, 63 Cal. App. 536, 219 Pac. 87, Grace Grogan contended that the bequest contained in the will operates merely as the fulfillment of an obligation and the execution of a trust created by contract between the parties, and that it constitutes merely the satisfaction of an obligation theretofore existing between the parties and does not constitute a bequest or transfer within the meaning of the Inheritance Tax Act. However, the Court held:

"It matters not whether the legacy be a gratuity or 'for money's worth.' There is nothing in the statute which would indicate an intention on the part of the Legislature that there should be any limitation on the apparently plain language contained therein, or that there should be any exception whatsoever thereto. Everything in the nature of a change of ownership effected through a will is apparently included. The reason for such transfer is not taken into consideration. The result is all that is considered; that is, the transfer itself. Viewed from one standpoint, it might be said that Mrs. Grogan's right was one which rested in the agreement entered into between her and her husband; that she had in effect bought and paid for everything that she was to receive; and that nothing remained to be done but the turning over of the property to her through the medium of the will. But even that does not surmount the obstacle. The right to real property undoubtedly exists in every ordinary sale where the consideration is first paid. It is not a tax on the right to conveyance that is usually made, but it is a tax on the transfer by which the conveyance is consummated. * * * It is in effect a declaration of law that when

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a will is used as a means of conveyance of property a tax must be paid for that privilege. * * *

I, of course, am aware that the whereabouts of the present title to this property has not been mentioned in the brief submitted on behalf of Mrs. Moore, but I am equally aware that no explanation has been attempted or offered as to what is the effect of this devise to her.

It therefore seems that the rule laid down by these cases can be stated as follows. That regardless of what agreement the husband and wife may have had with reference to improvements or with reference to the taking of title, where the money was furnished by a person other than the one who took title and if later on there is a will and the property passes under it to the person who put up the money, that, nevertheless, a tax is due, and that where this same condition exists, the State is not bound by extrinsic evidence even though in accord with the evidence equity would impress the property with a trust.

March 14, 1940—O-757.

INTANGIBLE PROPERTY OF NONRESIDENT DECEDENT NOT
TAXABLE UNDER SECTION 4, CHAPTER 16015,
ACTS OF 1933

Dear Sir:

This acknowledges receipt of your letter of March 12, 1940, wherein you inquire whether or not the provisions of Section 4, Chapter 16015, Laws of Florida, Acts of 1933 (Section 1342 [84] Compiled General Laws, Permanent Supplement) affecting assets of decedents dying after 12:01 A. M., October 1, 1933, permit the assessing of an estate tax on money or intangible personal property located in Florida and belonging to the estate of a person who dies a resident of some part of the United States other than Florida.

Said section imposes a tax upon the transfer of "*real property* situate and *tangible* personal property having an actual situs in this State" of every person who at the time of death was not a resident of this State but was a resident of the *United States*.

I am, therefore, of the opinion that since that section does not impose a tax on money or intangible personal property located in Florida and belonging to the estate of a person who dies a resident of some part of the United States other than Florida, that same is not taxable, thereunder.

SECTION 6

Taxation—Intangible Personal Property Tax

March 2, 1939—O-74.

BUILDING AND LOAN ASSOCIATIONS NOT EXEMPT ON
CONTRACTS FOR DEEDS*Dear Sir:*

I am in receipt of your letter of the 28th ultimo, enclosing copy of letter from the Honorable A. H. St. John, Tax Assessor of Duval County, requesting an opinion as to whether or not contracts for deeds executed by a Building and Loan Association on lands which they own, should be assessed under the Intangible Tax Law.

Subdivision 2 of Section 3 of Chapter 15789, Acts of 1931, provides as follows:

"Class B Intangible Personal Property shall include all notes, bonds and other obligations for the payment of money which are secured by mortgage, deed of trust, or other leases or liens upon real or personal estates situated in Florida, provided that only that part of the value of the mortgage, deed of trust, lease or other lien, the property of which is located within the State shall bear to the whole value of the property described in said obligation, shall be classified and known as Class B Intangible Personal Property."

Section 3 of Chapter 15908, Laws of Florida, Acts of 1933, in part provides as follows:

"* * * All notes, bonds, mortgages or shares of stock shall be exempt from the provisions of Chapters 15787 and 15789, Laws of Florida, 1931."

A contract for deed to land owned by Building and Loan Association is not specifically exempted from taxation under the Intangible Tax Law, and the rule is "a statute exempting from taxation should receive a strict construction, and no property should be held exempt unless clearly within its terms. *Rast v. Hulvey*, 77 Fla. 74, 80 So. 750.

There is no decision of the courts on this question, and it is my opinion that since contracts for deeds to land owned by Building and Loan Associations are not specifically exempted by Chapter 15908 from the operation of the Intangible Tax Law, these contracts, although they are owned by such Building and Loan Associations, should be taxed.

May 10, 1939—O-262.

CERTIFICATES FEDERAL SAVINGS AND LOAN ASSOCIATION
TO BE TAXED AS CLASS A*Dear Sir:*

I am in receipt of your letter of the 9th, enclosing copy of Savings Share Account Book and Certificate of Investment Share Account issued by the

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First Federal Savings and Loan Association, and inquiring as to whether or not these certificates should be taxed under Chapter 15789, Laws of Florida, 1931, as Class A Intangible Personal Property.

Class A Intangible Personal Property is defined in Chapter 15789 as follows:

"Class A Intangible Personal Property is hereby defined as being all stocks, or shares of incorporated or unincorporated companies, all bonds except bonds of the several municipalities and counties of the State of Florida, and also such bonds or governmental bonds as may be exempt from taxation under the Constitution or laws of the United States or the State of Florida."

Subsection (b) of Section 1464, Title 12, U. S. C. A., provides as follows:

"Such associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is therein provided. No deposits shall be accepted and no certificates of indebtedness shall be issued except for such borrowed money as may be authorized by regulations of the Board."

So there can be no question but that the Federal Savings and Loan Association cannot accept deposits and that a person putting his money in such association must buy shares of stock. It is, therefore, my opinion that the certificates issued by the Federal Savings and Loan Association should be taxed as Class A Intangible Personal Property.

May 29, 1939—O-262-1.

**FEDERAL SAVINGS AND LOAN ASSOCIATIONS LIABLE
UNDER LAW**

Dear Sir:

I am in receipt of your letter of the 22nd, inquiring as to whether or not assets belonging to Federal Savings and Loan Associations are subject to an intangible tax. In reply thereto I would state that under the provisions of Chapter 16844, Laws of Florida, 1935, relating to Building and Loan Associations, it is in part provided:

"All notes, bonds, mortgages or shares of stock shall be exempt from the provisions of Chapters 15787 and 15789, Laws of Florida, 1931."

Chapter 16843, Laws of Florida, 1933, specifically provides that:

"Federal Savings and Loan Associations and stockholders therein shall be entitled to the same exemptions from taxation or otherwise that are now provided by law or which may hereafter be provided by law for Florida Building and Loan Associations."

Subdivision (h) of Section 1464, Title 12, United States Code Annotated, relating to Federal Savings and Loan Associations, provides as follows:

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"(h) Exemptions from taxation. Such associations, including their franchises, capital, reserves, and surplus, and their loans and income, shall be exempt from all taxation now or hereafter imposed by the United States, and all shares of such associations shall be exempt both as to their value and the income therefrom from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States; and no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions."

It is therefore my opinion that all assets of Federal Savings and Loan Associations, except notes, bonds, mortgages or shares of stock owned by Federal Savings and Loan Associations, are subject to intangible tax as long as they are assessed on the same rate or not greater than the rate upon which like assets of other institutions are taxed in this State.

June 16, 1939—O-382.

**STEPS TO BE TAKEN BY TAX COLLECTOR TO ENFORCE
PAYMENT**

Dear Sir:

I am in receipt of your letter of the 14th, in which you inquire as to what steps may be taken by a tax collector to enforce the payment of intangible personal property taxes. Section 19 of Chapter 15789, Laws of Florida, 1931, provides as follows:

"All intangible personal property taxes shall be a lien on all the real or personal property of the taxpayer in the county in which they are assessed, or any other county in the State of Florida, from the time the tax upon intangible personal property becomes due."

Section 950, Compiled General Laws of Florida, 1927, provides as follows:

"All taxes shall be due and payable on the first day of November, of each and every year, or as soon thereafter as the assessment roll may come into the hands of the tax collector, of which he shall give notice by publication, and the tax collector is hereby vested with the power and it shall be his duty to collect by levy and sale of the goods and chattels, lands and tenements assessed, all taxes that remain unpaid on the first Monday in April. If any taxpayer shall pay his taxes between the first day of November and the first day of December he shall be allowed by the tax collector a discount of two per cent therefrom; and if he shall pay on the first day of December, or between that day and the first day of January, he shall be allowed a discount therefrom of one per cent thereof. Any tax paid on or upon the first day of January shall, for the purpose of the additions aforesaid, be regarded as paid on the last day of the month in which it is paid."

These two sections should be construed together, and in my opinion

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delinquent taxes on intangible personal property are a lien on all real and personal property of the taxpayer situated in this State, and if the taxes are not paid by the first Monday in April of the year following the assessment, it is the duty of the tax collector to collect these taxes by levy on and sale of any real or personal property owned by the taxpayer in this State.

We have examined all the printed copies of the 1939 laws that have been forwarded to us by the Secretary of State and we have not found where the above cited statutes have been changed by the 1939 Legislature; however, this examination was not complete, due to the fact that all of the laws have not as yet been printed.

July 20, 1939—O-488.

STEPS TO BE TAKEN TO ENFORCE COLLECTION

Dear Sir:

I am in receipt of your letter of the 19th, enclosing letter from the Honorable W. W. Whitehurst, County Attorney at Wauchula, referring to an opinion of mine dated June 16, 1939, dealing with the question of steps to be taken by a tax collector to enforce payment of intangible personal property tax and inquiring specifically as to what steps should be taken.

As I pointed out to you in my letter of the 16th, taxes on intangible personal property under the provisions of Section 19 of Chapter 15789, Laws of Florida, 1931, are a lien upon all the real or personal property of the taxpayer in the county in which they are assessed, and under Section 950, Compiled General Laws, 1927, it is the duty of the tax collector to collect the taxes by levy and sale of the goods and chattels, lands and tenements of the taxpayer. This tax being a tax on personal property, it is clear from Sections 955 and 956 that the tax collector may issue a warrant directed to the Sheriff to levy on any personal property owned by the taxpayer upon which the lien of the taxes has attached and that the same may be sold in accordance with the provisions of Section 956, Compiled General Laws, 1927, or if the tax collector desired, he could file a bill in equity to subject the lands or the personal property to the lien of the intangible taxes under the provisions of Section 896, Compiled General Laws. For other methods of enforcing the lien of taxes, see *The City of Bradenton v. Lee*, 162 So. 139.

I do not believe that the amount of taxes assessed on intangible personal property and which is a lien on real property of the taxpayer could be included in a tax sale certificate issued against land for non-payment of taxes on the land, as the statutes contemplate that the only thing included in this tax sale certificate should be the taxes and costs due against the particular land, not the lien for taxes on other property.

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July 19, 1939—O-478.

TERMINAL ANNUITIES SUBJECT TO, UNDER CHAPTER 15789*Dear Sir:*

In reply to your letter of the 14th, in which you request my opinion as to whether or not terminal annuities are taxable under the provisions of Chapter 15789, Laws of Florida, Acts of 1931, I would state that there is no doubt that such annuities are intangible personal property as defined in Class C under subparagraph 3 of Section 3 of the above mentioned Act. In this connection see *Wilkin v. Board of Commissioners of Oklahoma County*, 186 Pac. 474.

My predecessor, in an opinion dated January 5, 1934, found on page 59 of the 1933-34 Report, had this to say on this question:

"ANNUITY

"The same rule applies to any contract for an annuity where the contract has a present cash surrender value. If the contract does not have a present cash surrender value, then the present actual cash value should be determined and assessed accordingly."

It is therefore my opinion that terminal annuities are taxable as intangible personal property under our Intangible Tax Law.

August 8, 1939—O-517.

BROKERS HOLDING SECURITIES REQUIRED TO MAKE RETURN*Dear Sir:*

I am in receipt of your letter of August 7, in which you inquire as to whether or not accounts receivable owned by brokers qualified to do business in this State, arising out of business transacted in this State, are subject to intangible taxes.

In reply thereto, I would state that Paragraph 1 of Section 3 of Chapter 15789, Laws of Florida, Acts of 1931, provides as follows:

"(1) Class A Intangible Personal Property is hereby defined as being all stocks, or shares of incorporated or unincorporated companies, all bonds except bonds of the several municipalities and counties of the State of Florida, and also such bonds or governmental bonds as may be exempt from taxation under the Constitution or laws of the United States or the State of Florida."

Paragraph 3 of Section 3 provides as follows:

"(3) Class C Intangible Personal Property shall include all other intangible personal property not embraced in Class A and B Intangible Personal Property, provided that intangible personal property belonging to the State of Florida, or any political subdivision thereof, and/or any Religious, Char-

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itable, Benevolent or Educational Association shall be exempt from taxation. Provided, however, that nothing herein contained shall apply to franchises."

In the case of *Chase v. Boston*, 62 N. E. 1059, we find the following:

"The ordinary relation between a customer buying stock on margin and his broker is not that of pledgor and pledgee, but the broker is the owner of the stock and it is taxable to him as his property, for he is not bound generally to keep the stock of any one customer distinct, but has the right to take a single certificate in his own name for several customers and power to pledge the whole as collateral for a loan made to him."

Paragraph 3 of Section 3, above quoted, covers accounts receivable incurred through the purchase of securities on margin. See *Cooley on Taxation*, Paragraph 575.

It is therefore my opinion that brokers qualified to do business in this State, who purchase on margin securities for customers in this State and hold them to secure the purchase price, the securities being actually held by the broker in this State, that these securities should be returned for taxation under Paragraph 1 of Section 3, and that if a broker operating in this State receives an account receivable for a purchase of any security in this State and the account receivable is payable in this State, then it is, my opinion that such account receivable should be taxed under the provisions of Chapter 15789, Laws of Florida, 1931—the Intangible Tax Law.

September 18, 1939—O-570.

**BUSINESS SITUS—PROPERTY OF ALIEN LOCATED IN FLORIDA
SUBJECT TO**

Dear Sir:

This will acknowledge receipt of your letter of September 16 requesting me to give you an opinion upon the matter mentioned in a memorandum from Mr. Lummus, County Tax Assessor of Dade County, Florida, that was attached to your letter. Mr. Lummus states that one

"Mr. Cleveland is, in the writer's opinion—and he does not deny it—the true agent of this alien and the securities owned are purchased and retained in this State and disposed of at the will of her agent—or at least through her agent.

"In the writer's opinion her securities are taxable for although she is an alien, she spends some time in the States and the securities apparently have their situs in the State of Florida."

The question therefore to be determined is:

Can Intangible personal property acquire a business situs for the purpose of taxation in a State or nation other than the domicile of the owner?

The Supreme Court of Florida in a very recent case said:

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"Section 8 of Chapter 15789 interpreted with reference to the commands of the constitution and the intendments of Chapter 15789, means that all intangible personal property which is subject to taxation under the laws of Florida shall be returned for taxation 'by every person, firm or corporation' 'in this State' 'owning or having the control, management or custody' of such property.

"The statute has reference to all taxable intangible personal property that has its taxation situs in this State, which includes the intangible personal property in this case, no business situs of such property elsewhere being duly shown."

J. B. Starkey, as Tax Collector of Pinellas County, Florida, Appellant, v. Nell W. Carson, as Executrix of the Last Will and Testament of John F. Carson, deceased, Appellee. Decided May 26, 1939, So.

In this case it was contended that the Appellee did not have to pay taxes upon intangible property of a resident when such intangible property was located outside the State of Florida and had never been in this State. However, the Court said:

"The allegation that the intangibles have a business situs in other named States is insufficient to show a business elsewhere that would relieve the intangibles from taxation at the domicile of the owner. See *Hunt v. Turner*, 54 Fla. 654, 45 So. 509."

Our Supreme Court has therefore recognized that intangible property can acquire a business situs for the purpose of taxation within the State of Florida and that our intangible act is sufficiently broad to levy a tax upon all intangible personal property that is subject to taxation in the State of Florida. In addition to the case last cited see *The Atlantic National Bank v. Simpson*, 188 So. 636.

I find that the Supreme Court of Florida is not alone in so interpreting the powers of the State to tax intangible property that has acquired a business situs within the State. The Supreme Court of the United States in the case of *Wheeling Steel Corporation v. Fox*, 298 U. S. 193, 80 L. Ed. 1143, has also recognized this right and in this opinion cites many cases of this Court in support thereof.

I find an excellent annotation upon this subject in 76 A. L. R., page 806. One of the cases seems to very clearly announce the doctrine in the following language:

"We think it entirely just and equitable that, if persons residing abroad bring their property and invest it in this State for the purpose of deriving profit from its use and employment here, and thus avail themselves of the benefits and advantages of our laws for the protection of their property, their property should yield its due proportion towards the support of the government which thus protects it." *Catlin v. Hull*, 21 Vt. 152.

The term "business situs" seems to me best defined by a case appearing

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in said annotation on page 807 of *Crane Company v. DesMoines*, ante, 801, as follows:

"That the term 'business situs,' while of modern origin, would seem to mean what the words indicate, that is, a situs in a place other than the domicile of the owner, where such owner, through an agent, manager, or the like, is conducting a business out of which credits or open accounts grow and are used as a part of the business of the agency."

A. L. R. also says:

"Another statement of the rule is found in *Matzenbaugh v. People*, 194 Ill. 108, 88 Am. St. Rep. 134, 62 N. E. 546, to the effect that a business situs is established when the instruments which evidence the right of the owner to receive the indebtedness which constitutes the credit are in the hands of an agent of the owner for the purpose of enabling such agent to transact the business of the owner, in which business the credit constitutes, as it were, the subject-matter or stock in trade of such business.

Applying the law to the facts that you have given me, I am of the opinion that since this alien has constituted Mr. Cleveland as her agent and since the securities are held in this State by such agent after he has purchased them and are disposed of at the will of such agent or through such agent, that such property has acquired a business situs for the purpose of taxation of intangibles in this State.

Several recent opinions of the Supreme Court of the United States indicate that this Court is still pursuing a line of thought expressed by it in the above cited cases of that Court.

November 20, 1939—O-660.

**PRIORITY TO THE LIEN OF THE MORTGAGE ON REAL
PROPERTY**

Dear Sir:

I am in receipt of your letter of the 15th * * * requesting my opinion as to whether or not the State of Florida may be made a party defendant to a foreclosure suit instituted against real property by a mortgagee, whose mortgage lien is superior to the lien of taxes on intangible property. I see no reason why the State should not be made a party to such suit as all intangible taxes are assessed for the benefit of the State of Florida. However, I cannot accept as correct the premise * * * that the lien of the mortgage on real property is superior to that of the State's lien of taxes on intangible property assessed after the lien for the mortgage is recorded. Section 896, C. G. L. 1927, in part, provides as follows:

"All real and personal property shall be subject to taxation on the first day of January of each year, and this Chapter shall create a lien upon such property for the purposes thereof superior to all others, which lien in addi-

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tion to the provisions of this Chapter for the collection of taxes on personal property may be enforced by suit in equity."

It has always been the law in this State that taxes of this State constitute a prior lien on all property of the taxpayer.

February 19, 1940—O-734.

**COMPTROLLER WITHOUT AUTHORITY TO ADJUST PAST
ASSESSMENTS TO CONFORM TO DECISION IN SEABOARD
AIR LINE CASE—SECTION 7, CHAPTER 15789,
ACTS OF 1931**

Dear Sir:

This will acknowledge receipt of your letter of recent date requesting me to refer to the decision in the Seaboard Air Line case in which you state the Court decided " * * * the basis of valuation used by different Tax Assessors throughout the State was on an average of considerably less than 50%. * * *"

You then refer me to Section 7 of Chapter 15789, Acts of 1931, and request me to advise you if you, the Tax Assessor or any other administrative officer has authority to adjust past assessments so that they will conform to the decision of the Court and the Act mentioned above.

Section 7 of Chapter 15789, Acts of 1931 (the Intangible Tax Act) provides:

"The taxable value of all intangible personal property which is assessed on said tax roll shall be on the same basis of valuation as is used for the assessment for taxation of real or personal property."

I do not know of any authority for you or any other administrative officer to make any general adjustment of assessments of intangible property for taxation regardless of the fact that some court may have held that certain property of a litigant was incorrectly assessed.

The Section of Chapter 15789 that you refer to provides for the method of assessing intangible property but I do not find in this Act where you or any other administrative officer is authorized to make any change in any assessment that has already been made except that I do find under Sections 13 and 14 of the Act that adequate provision has been made for a Board of Equalizers who may hear complaints, receive testimony and thereafter revise and equalize the intangible property tax roll.

I, therefore, cannot see how the Seaboard Air Line case that you refer to has in anywise authorized you or any other administrative officer to make any general adjustment of intangible taxes regardless of whether or not Section 7 of Chapter 15789, Acts of 1931, was followed by the various county tax assessors.

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May 9, 1940—O-796.

CASH SURRENDER VALUE OF LIFE INSURANCE POLICIES*Dear Sir:*

This will acknowledge receipt of your letter of May 2 requesting me to give you an opinion upon a question that has been previously answered by this office. You attach a letter from Mr. Milam who states:

" * * * that former Attorney General Cary D. Landis, by an opinion dated January 5, 1934, appearing as Section 96 of the Bulletin of the Comptroller dealing with Intangible Personal Property taxation, construed Class A of Section 3 of the Intangible Personal Property Taxation Act of 1931 to cover and include the cash surrender value of a life insurance policy."

This is the opinion I am requested to re-examine and as per your request, I have reconsidered said opinion.

The cash surrender value of a policy of insurance is certainly not to be placed in the same category as the ordinary commercial paper, such as negotiable instruments of various kinds, nor is it to be considered as intangible property such as other commercial paper for the reason that it has no salable value upon the markets of the world. The cash surrender value of a life insurance policy is only an incidental part thereof and at most it is only an inchoate right that, if exercised, must contemporaneously with the demand for its payment, necessarily surrender all other rights that are contemplated by the policy contract.

Life insurance policies are primarily designed to afford protection to individuals. The life of the insured has a value to his family and his creditors, either of whom may be the beneficiary in the policy. One does not generally take out a policy of life insurance merely to obtain its cash surrender value. The amount the policy-holder pays by way of premiums is not devoted wholly to the cash surrender feature of the policy. While it is a valuable right policies contain other provisions more valuable to the assured and of ultimately greater monetary value. For example, the cash surrender value is materially less than the value payable at death.

We therefore see that this is not property of the kind customarily bought and sold as an article of commerce and that it must be placed in a separate category.

We cannot use the ordinary means for determining its value and I have carefully examined the Intangible Tax Act to ascertain if the Legislature has provided some yardstick by which the present value of the cash surrender value of a policy of insurance could be determined. I have failed to find any provision in this Act whereby this tax could be computed upon a certain basis which I think necessary before I can hold that the cash surrender value of a policy of insurance is taxable. See *Metropolis Pub. Co., et al., v. Lee*, 126 Fla. 107, 170 So. 442.

I therefore modify the opinion upon this question given under date of

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January 5, 1934, to the extent pointed out herein. This opinion is limited strictly to those policies of insurance that are commonly known as life insurance policies, which policies are primarily designed to insure the life of the person taking out such a policy and contain as an incidental feature only, a cash surrender value.

June 12, 1940—O-832.

AUTHORITY OF STATE TO TAX PROPERTY OF NATIONAL BANKS

Dear Sir:

This will acknowledge receipt of your letter of June 3 calling my attention to an opinion of this office dated January 5, 1934, holding that intangible personal property tax could not be levied against national banks, and asking me to review this opinion in the light of the case of *Tradesman National Bank of Oklahoma City v. Oklahoma Tax Commission*, reported in 84 L. Ed., page 588, and see if there was not some way under which national banks would be required to pay an intangible personal property tax.

The Oklahoma case dealt with the question of taxing the income of shares of national banking associations under Section 548 of Title 12, U. S. C. A. This section provides in part as follows:

"The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

"1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause."

And the case only decided that the income from United States Government bonds and bonds of other Federal agencies owned by the bank were taxable under plan 4 of Section 548, the State of Oklahoma having passed an Act levying a tax on national banking associations "according to or measured by their net income."

It has long been the settled law that property of national banks cannot be taxed by States except under specific authorization of Congress. See Section 531, Title 12, U. S. C. A. which is as follows:

"Federal reserve banks, including the capital stock and surplus therein, and the income derived therefrom shall be exempt from Federal, State, and local taxation, except taxes upon real estate. Dec. 23, 1913, c. 6, Section 7, 38 Stat. 258; Mar. 3, 1919, c. 101, Sec. 1, 40 Stat. 1314."

The intangible assets of national banks can only be taxed under one of the methods prescribed by Section 546, *supra*, however, in view of Section 11,

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Article IX, of the Constitution of the State of Florida forbidding a tax on incomes in this State, the last two methods provided under Section 548 could not be used in this State. The Oklahoma case does not change the rule prohibiting the taxation of intangible assets of national banks and it is my opinion that such assets cannot be taxed.

July 17, 1940—O-867.

INSURANCE POLICY LOANS TAXABLE

Dear Sir:

You request my opinion as to whether or not policy loans and liens of life insurance companies are subject to an intangible property tax under Chapter 15789, Laws of Florida, Acts of 1931, and, if so, you further request my opinion as to how they should be classified for taxation. I assume that you inquire about that class of loans made by life insurance companies to their policy holders pursuant to the provisions of life insurance policies, in which the interest of the policy holder in the policy is pledged as security for the loan.

It is my opinion that the documentary evidences of such loans (promissory notes, etc.) are intangible personal property as defined in Section 2 of Chapter 15789, which reads as follows:

"'Intangible Personal Property' is hereby defined as all personal property which is not in itself intrinsically valuable but which derives its chief value from that which it represents."

It is further my opinion that such loans, when evidenced by written agreements, are taxable as Class B Intangible Personal Property, which is defined in Section 3 (2) of Chapter 15789, as follows:

"(2) Class B Intangible Personal Property shall include all notes, bonds and other obligations for the payment of money which are secured by mortgage, deed of trust, or other leases *or liens upon real or personal estates situated in Florida*, provided that only that part of the value of the mortgage, deed of trust, lease or other lien, the property which is located within the State shall bear to the whole value of the property described in said obligation, shall be classified and known as Class B Intangible Personal Property." (Italics ours.)

To be taxable under the provisions of Chapter 15789, the promissory notes or other written evidences of such loans must be the property of insurance companies domiciled in Florida or be held in Florida by foreign insurance companies having a business situs in this State. See *Starkey v. Carson*, 189 So. 389.

This opinion does not conflict with my opinion of May 9, 1940, to the effect that the cash surrender value of life insurance policies is not taxable as being intangible personal property of policy holders of life insurance. An entirely different question was presented in that opinion.

TAXATION — Intangible Personal Property Tax

August 1, 1940—O-888.

CREDIT UNIONS, STATE AND FEDERAL, NOT SUBJECT TO—
 HOLDERS OF SHARES OR DEPOSITS IN CREDIT UNIONS
 SUBJECT TO—SECTIONS 6494 (1) AND 6494 (19)
 C. G. L. SEC. 1768 U. S. C. A. 12

Dear Sir:

This will acknowledge receipt of your letter of July 30 requesting me to advise you "if Credit Unions, both State and Federal, are subject to an intangible tax, and are the shares or deposits in such Credit Unions held by individuals taxable?"

In reply I wish to advise that Credit Unions are authorized in Florida by Section 6494 (1), Compiled General Laws, Chapter 14499, Acts of 1929 Extra Session. A Credit Union is therein defined as:

"A credit union is a cooperative society, incorporated for the twofold purpose of promoting thrift among its members and creating a source of credit for them at legitimate rates of interest for provident purposes."

Since the Credit Union is a cooperative society, I am of the opinion that the Credit Union as such is not liable for an intangible tax.

I do not find any provision in this Act that extends an exemption to the holders of shares or memberships in a Credit Union, but I do find that Section 6494 (19) provides:

" * * * Any member may withdraw from the credit union at any time but notice of withdrawal may be required. All amounts paid on shares or as deposits of an expelled or withdrawing member, with any dividends or interests accredited thereto, to the date thereof, shall, as funds become available and after deducting all amounts due from the member to the credit union, be paid to him."

It is obvious from this Section that a member of a credit union is in practically the same situation as anyone with a savings account in any bank. I am, therefore, of the opinion that the holdings of a member of a credit union may be included in the valuation of the personal property of such owner or holder thereof in assessing intangible personal property taxes.

You also request me to advise you what class said property rights are to be placed in for taxation purposes.

In my opinion, since this property is not covered by Classes A or B of Section 3 of the Intangible Personal Taxation Act, that same is taxable under Class C. This seems to be in accordance with the regulations issued by your office under date of January 5, 1934, Section 27 thereof. (Same having been issued in pamphlet form.)

What I have said above applies to State Credit Unions.

The only remaining question to determine is whether or not Credit Unions

TAXATION — Intangible Personal Property Tax

organized under the Federal Act are subject to intangible taxes. Section 1768 U. S. C. A. 12, Banks and Banking, Pocket Supplement, provides:

"The Federal credit unions organized hereunder, their property, their franchises, capital, reserves, surpluses, and other funds and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such Federal credit unions shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. *Nothing herein contained shall prevent holdings in any Federal credit union organized hereunder from being included in the valuation of the personal property of the owners or holders thereof in assessing taxes imposed by authority of the State or political subdivision thereof in which the Federal credit union is located: Provided, however, that the duty or burden of collecting or enforcing the payment of such tax shall not be imposed upon any such Federal credit union and the tax shall not exceed the rate of taxes imposed upon holdings in domestic credit unions.*"

It is apparent from the language of the foregoing Act that the credit union itself is not taxable but that the holders of membership in any Federal credit union are taxable in accordance with the language of the Act, which means that both State and Federal holders of memberships in credit unions are subject to an intangible tax, and both are taxable under Class C of the Intangible Tax Act.

December 5, 1940—O-1007.

**TAXABILITY OF TRUST WHERE ONE OF TRUSTEES IS A
NONRESIDENT OF THIS STATE**

Dear Sir:

I am in receipt of your letter of the fourth in which you state:

"The Atlantic National Bank filed an intangible tax return as trustee under the will of Henry E. Bemis, and assessment was made accordingly.

"I am today in receipt of a letter from the Honorable Scott M. Loftin, stating that he, the bank and Mr. Henry L. Bemis of Ardmore, Pennsylvania, are the trustees under the will—and that inasmuch as one of the trustees resides in Pennsylvania, an assessment should be made only against two-thirds of the value of the intangibles. He has offered his check in settlement on this basis, and the Tax Collector is holding it up, pending an opinion from you. Will you kindly write me as promptly as possible about it."

You do not state in your letter whether or not the corporeal custody of the securities of the trust is maintained by the resident trustees of the State of Florida. If this is the case, then the whole trust should be taxed in this State, but if part of the securities are held in another State by a non-

TAXATION — Intangible Personal Property Tax

resident trustee, then I think this State could only tax two-thirds of the entire trust. See Cooley on Taxation. Vol. 2, Fourth Edition, page 1052:

"If there are two or more trustees, and part of them reside in one state and part in another state, the general rule is that the assessment of the property should be apportioned among them according to the relative number in the taxing state, in the absence of any statute to the contrary. But when there are several trustees, one of whom is domiciled in the state of origin of the trust, and the corporeal custody of the securities of the trust is with that trustee at his domicile, and the title of the trustees is joint and their powers must be exercised as a unit, there is no such severable ownership in one trustee resident outside the state where the trust was created, as makes him subject to taxation, unless so provided by statute."

See also *Newcomb v. Paige*, 113 N. E. 458.

SECTION 7

Taxation — License Tax

June 10, 1939—O-54-1.

CLASSIFICATION AND DEFINITION OF "TRUCKS"—WEIGHT OF
"FIFTH-WHEEL"—SECTIONS 1280 C. G. L. AND
1285 (14) C. G. L., SUPPLEMENT*Dear Sir:*

This is in reply to your letter of June 2nd, in which you enclose a letter from Mr. John A. Ebel, of the Florida Trucking Association, Inc.

You request my opinion as to whether the "fifth-wheel" used on a tractor-trailer combination vehicle should be included for license tax purposes in the weight of the tractor or the weight of the trailer. The "fifth-wheel" is the mechanical device employed for the purpose of connecting together the tractor and trailer and weighs approximately 300 pounds. It very often happens that the weight of this "fifth-wheel" will be sufficient to take a truck out of the classification known as the "GFH Series" at \$1.00 per 100 pounds, into the "HFH Series" at \$1.75 per 100 pounds.

You further state that in the past, the ruling of your department has been that the weight of the "fifth-wheel" is added to that of the tractor in computing the license tax thereon.

Under section 1285 (14) Compiled General Laws of Florida, Permanent Supplement, you have broad administrative discretion with regard to determining classification of motor vehicles for license tax purposes. Section 1285 (14) reads as follows:

"(14) The State motor vehicle commissioner shall have authority to determine the classification of, and the amount of tax due on any motor vehicle required to be registered under the laws of Florida, and shall have authority and power to fix, determine and assess the amount of registration or reregistration fees and taxes to be paid for registration, reregistration and license thereof and his determination when made and certified to in writing shall be prima facie evidence of the validity, regularity and propriety thereof and of the liability of the motor vehicles involved therein to classification and tax so determined, fixed and assessed. No such determination when made by the State motor vehicle commissioner shall be disregarded or set aside in any court, except when clearly shown to be unwarranted in law or in fact."

My attention is called to the opinion of the late Honorable Cary D. Landis, as Attorney, under date of January 22, 1938, in which he refers to the definition of "net weight" contained in Section 1285, Compiled General Laws, Permanent Supplement. The question presented to the Attorney General in that instance was whether the weight of gas, oil and water was to be computed in determining the amount of tax payable. The Attorney General correctly concluded that the statutory definition of "net weight" did not include the weight of gas, oil and water. The question there pre-

TAXATION — License Tax

sented was essentially different from the problem with which we are now dealing.

To begin with, it is essential that we consider the definition of the word "truck" set forth in Section 1280 C. G. L., as follows:

"'Trucks' as defined in this Chapter shall include any motor vehicle designed or used principally for carrying things other than passengers and includes a motor vehicle to which has been added a cabinet box, platform, rack or other equipment for the purpose of carrying merchandise other than the person or effects of the passengers. *Also any unit consisting of tractor and trailer so constructed as to haul merchandise or loads other than persons.*" (Italics ours.) See also the opinion of the Supreme Court of Florida, in the case of *Hart v. Stinson*, 185 So. 139, in which the Court stated:

"However, if a unit of tractor and trailer, or a tractor, is so constructed and used to haul merchandise or loads other than persons, then it becomes a truck, and it is subject to the license provisions of the statute."

It would seem from Section 1280, C. G. L., and from the opinion of the Supreme Court of Florida, in the case of *Hart v. Stinson*, that your legal "authority would even extend so far as to authorize you to tax a tractor and trailer as though they both constituted one vehicle. In the event you should adopt this construction, then the entire weight of the tractor, the trailer, and the "fifth-wheel" could be included and taxed as a single vehicle in the "HFH Series."

Since you are specifically authorized under Section 1285 (14) Compiled General Laws, Permanent Supplement, to determine the classification and amount of tax due on any motor vehicle, certainly a determination by you that the "fifth-wheel" can be added to the weight of the tractor is not erroneous, particularly in view of the fact that under the statutory definition of a "truck," you would even be authorized to add also the weight of the trailer.

July 20, 1939—O-487.

NO AUTHORITY TO ISSUE A LICENSE FOR A HALF YEAR

Dear Sir:

I am in receipt of your letter of the 19th, in which you request my opinion as to whether or not you have authority to issue a license under Chapter 17992, Laws of Florida, 1937, for a half year. I have examined the above Act and do not find any provision therein for pro-rating licenses under the Act. In the absence of such a provision, I do not believe that you have authority to issue a license for a half year. See 37 C. J. 250, where the following is found:

"In the absence of a provision for a pro-rata license a person taking out a license must pay the full amount prescribed even though he takes out his license after the beginning of the license year or discontinues his business before the expiration of such year."

TAXATION — License Tax

See also *McClure v. State*, 88 So. 35; *Dohs v. Holme*, 189 N. W. 418.

You call my attention to Section 4 of Chapter 18011, Acts of 1937, which provides for a pro-rata issuance of licenses under that Act. This section of the Act only deals with licenses issued under the provisions of that Act and cannot be construed to refer to a license issued under the Insecticide Law.

The fiscal year under the Insecticide Law begins on the 1st of January and closes with the 31st of December of each year, while under the General License Law, it begins on the 1st of October of each year. No part of the Insecticide Law is repealed by Chapter 18011, which specifically provides in Section 39:

"That nothing herein shall be construed to repeal any license tax now imposed by law and not specifically repealed hereby."

July 28, 1939—O-500.

DRIVERS' LICENSE—WHEN REPRESENTATIVES OF FOREIGN COUNTRIES EXEMPT?

Dear Sir:

In your letter of the 24th instant you ask to be advised whether representatives of foreign countries should be granted exemptions from the requirement for licenses under Chapter 19551, Laws of Florida, Acts of 1939.

Section 15 of the Act provides:

"No person, except as hereinafter expressly exempted, shall drive any motor vehicle upon a highway in this State unless such person has a valid license as an operator or chauffeur under the provisions of this Act."

The exemptions referred to in Section 15 are enumerated in Section 16 of the Act. Paragraph numbered 3 of Section 16 of the Act exempts from the requirement of an operator's license a "non-resident who is at least 16 years of age and who has in his immediate possession a valid operator's license issued to him in his home state or country * * * ." "Non-resident" is defined in Section 13 as "every person who is not a resident of this State."

As to an Act all-inclusive in the scope of its application, except as to exemptions expressly provided for and enumerated, the rule of construction is that nothing is to be exempt other than those expressly enumerated therein. Under this rule of construction the representatives of foreign countries are not exempt from the license requirements of Chapter 19551, Acts of 1939, unless, of course, they have a valid operator's license issued to them in their own country.

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March 14, 1939—O-96.

ITINERANT PHOTOGRAPHERS—CH. 18011, SEC. 6

Dear Sir:

In response to your letter of March 10 inquiring as to whether or not \$10 for the State and \$5 for the county is the proper license to charge a person for the privilege of soliciting orders and taking pictures in the State of Florida, as prescribed by Section 6 of Chapter 18011, Laws of Florida, Acts of 1937, I would state that I do not find any specific provision of the law fixing the license fees of such photographers, Section 1228, Compiled General Laws, 1927, having been repealed by the above mentioned 1937 law.

However, I do find that on November 5th, 1938, the Comptroller's Office issued an administrative construction of Section 6 of the above Act which places photographers under said Section. I am attaching a copy of said opinion for your information. The first paragraph of Section 6 of this Act is as follows:

"Every person engaged in any business, as owner, agent, or otherwise, the principal function of which is the performance of some service for the public in return for a consideration, shall for each place of business pay a license tax of \$10.00, plus one dollar for each person in excess of five persons employed thereat; provided, said license shall not exceed \$50.00."

I am informed by the Comptroller's Office that since their construction of this Act, it has worked exceedingly well throughout the State of Florida.

From my examination of the Act and with the principal rule in mind that administrative construction is entitled to great weight, I am of the opinion that under the circumstances mentioned in your letter, the proper license fee is \$10.00 for the State and \$5.00 for the County, plus the officer's fee for issuing the license and also any additional amount for any person over five which would be at the rate of \$1.50 per person.

January 18, 1939—O-27.

TRACTORS AND TRAILERS, WHEN SUBJECT TO

Dear Sir:

There has been considerable controversy in regard to whether or not tractors, and tractors with trailers, are subject to the licensing provisions of the Motor Vehicle License Act. This question was passed on by the Supreme Court of Florida in the case of *A. L. Hart v. J. C. M. Stinson* (not yet reported.)

The following is from the opinion of the Supreme Court in that case:

"However, if a unit of tractor and trailer, or a tractor, is so constructed and used to haul merchandise or loads other than persons, that it becomes a truck, it is subject to the license provision of the statute. If it be shown at

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a trial that each such tractor, or tractor and trailer, was being operated on the highways merely as a means of passage to and from a field, orchard or other place where the tractors or tractor and trailer, and their loads, if any, were to be used for present current agricultural, horticultural or other crop producing purposes, and the public highways were not being used by such tractors or trailers for distinct motor vehicle or trailer transportation purposes, but the highways were merely used for very short distances in passing to and from the owner's home or farm or grove or orchard headquarters to such farm, grove or orchard or other place of production, the tractor or trailer and load to be there used by or for the owner in his crop productions, then in such cases the intendments of the statute as now framed may not be thereby violated if such use is not unduly injurious to the roadway or dangerous to the lawful users of the highways."

It is apparent from the opinion of the Supreme Court above referred to that whether or not a tractor or tractor with trailer is subject to the tax depends upon two elements—(1) the *place* where the tractor or tractor with trailer is being operated; and (2) the *nature* of the *load*, if any, being transported. For the guidance of your inspectors in enforcing the Motor Vehicle License Act with regard to tractors and tractors with trailers it is my opinion that under the decision of the Supreme Court in the Hart case (*supra*) there is no motor vehicle tax liability in the following instances:

1. When the tractor, or tractor with trailer, is operated on a public highway for a short distance on a direct route between the owner's home or farm headquarters, as the case may be, and his grove, orchard or other place of production, or on a direct route from one field, orchard or grove of the owner to another such field, orchard or grove.

2. When the tractor, or tractor with trailer, is operated in the places outlined in paragraph numbered 1 and loaded with materials, supplies or implements intended to be used for present current agricultural, horticultural or other crop producing purposes.

If one of your inspectors should find a tractor or tractor with trailer transporting other than the agricultural materials, etc., hereinabove referred to, or if he should find a tractor or tractor with trailer hauling any materials whatsoever off the route hereinabove outlined, the presumption would be that a motor vehicle license is required.

July 19, 1939—O-481.

HOTELS REQUIRED TO PAY ADDITIONAL

Dear Sir:

I am in receipt of your letter of the 18th, in which you inquire as follows:

"I will appreciate it if you will advise me if hotels have to pay additional occupational license tax for operating dining rooms combined with European plan hotels."

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Section 12 of Chapter 16042, Laws of Florida, 1933, provides in part as follows:

"Where any restaurant, lunch or sandwich stand or counter applies for license after April 1st of any year, the fee charged for such license shall be one-half the annual rate. However, where said business was subject to license prior to April 1st, no such fractional rate shall be allowed: *Provided, that any hotel of more than twenty rooms operating a dining room, coffee shop or lunch counter shall be required to pay the above restaurant fees for each such place in addition to the hotel license fee:* *Provided, that all restaurants, lunch or sandwich stands or counters or other structures in course of construction shall be subject to and required to pay the same schedule of license fees for inspection during construction as they are required to pay herein for inspection when in operation as such.*"

It is therefore my opinion that if an hotel has more than twenty rooms and operates a dining room on the European or American plan, that it has to pay an additional occupational license tax for operating a restaurant.

July 13, 1939—O-472.

SPECIAL TAX REQUIRED TO HUNT DEER

Dear Sir:

This is in reply to your letter of July 5th.

In my opinion, you are correct in ruling that persons hunting deer pursuant to the provisions of House Bill 1485, Acts of 1939, must have a regular hunting license, as well as the special license provided for in Section 8 of that Act. The proceeds from the sale of the special license must be used in restocking the area with tick-free deer. It is an additional license for the additional privilege of hunting out of the regular season, and does not take the place of the regular license required by general law.

It is my further opinion, however, that regular agents of the Live Stock Sanitary Board, in carrying out their lawful duties, are not required to have any hunting license. To require them to have licenses would, in effect, amount to the taxation of one governmental department of the State by another.

August 11, 1939—O-529.

**DRIVERS' LICENSES — EMPLOYEES FOREST SERVICE AND
CIVILIAN CONSERVATION CORPS— REQUIRED TO
PAY UNDER CHAPTER 19551, ACTS OF 1939**

Dear Sir:

This will acknowledge receipt of your letter of August 10th asking me to advise you if in my opinion employees of the Forest Service and enrollees of the Civilian Conservation Corps, are exempt from the driver's license fee

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provided for in the Driver's License Law. You state that your attention has been called to Section 16, paragraph 1, exempting Army, Navy and Marine Corps of the United States enrollees.

In reply I wish to advise that I have read carefully the entire Act above referred to and I find no provision with reference to exemptions other than the one you refer to, i. e.: paragraph 1 of Section 16, and it certainly could not be said that either the employees of the Forest Service or enrollees of the Civilian Conservation Corps are in the service of the Army, Navy or Marine Corps of the United States.

Therefore, since there is no exemption set forth in this Statute, you, as Administrative Officer, should carry out its terms as written until some court having jurisdiction of the subject matter has determined the matter to the contrary.

August 18, 1939—O-544.

**HOTELS MUST PAY OCCUPATIONAL TAX IN ADDITION TO
LICENSE TAX IMPOSED BY HOTEL COMMISSION ACT**

Dear Sir:

This will acknowledge receipt of your letter of August 17th stating that complaints have reached you that in some counties the authorities are attempting to impose on the European plan hotels a tax under Section 5 of Chapter 18011, Laws of Florida, 1937. You state further that you understand this is a chain store tax. You ask me to give you an opinion as to whether or not hotels operating under the European plan are required to pay an additional tax in addition to the license tax imposed by Section 12, Chapter 16042, Laws of Florida of 1933.

In reply I wish to advise that Chapter 18011, Laws of Florida of 1937, is not a chain store tax. It is a general occupational tax act and it levies a tax upon all forms of business and particularly hotels under Section 21.

Chapter 16042, Laws of Florida of 1933, is the Act providing for the Hotel Commission, and the purpose of the tax levied there is entirely different from the general occupational tax act.

Therefore, I am of the opinion that hotels should be required to pay the tax levied under Chapter 18011, Laws of Florida of 1937.

August 26, 1939—O-551.

**MOTOR VEHICLES—CONSTRUCTION OF CHAPTER 17398,
ACTS OF 1935**

Dear Sir:

This is in reply to your request for an opinion as to whether or not Chapter 17398 is still applicable to Highlands County with respect to the handling of automobile license tags.

TAXATION — License Tax

That Act is a population measure applying to counties having a population between 9000 and 9300 according to the *Federal Census of 1930*, and applied to Highlands County. You will note that the population restriction is not ambulatory, but is determined by the 1930 census. I am, therefore, of the opinion that the applicability of the Act to Highlands County was not altered by the 1935 census, which listed Highlands County's population as in excess of 10,000.

September 14, 1939—O-471-2.

FLORIDA DRIVERS' LICENSE LAW—CONSTRUCTION OF SECTION
13 (G) OF CHAPTER 19551, ACTS OF 1939—NECESSITY
FOR CHAUFFEURS' LICENSES

Dear Sir:

You request my opinion concerning the general principles which should determine whether a person should obtain a chauffeur's license rather than an operator's license, under the provisions of Chapter 19351, Laws of Florida, Acts of 1939.

The following are the definitions of "Operator" and "Chauffeur" contained in Section 13 of that Act:

"(f) Operator—Every person, other than a chauffeur, who is in actual physical control of a motor vehicle upon a highway.

"(g) Chauffeur.—Every person who is *employed* for the *principal purpose* of operating a motor vehicle and every person who drives a motor vehicle while in use as a public or common carrier of persons or property." (Italics ours.)

Among the many questions which have arisen are the following:

1. Do municipal employees hired to drive garbage trucks, water department trucks, gas department trucks, or other trucks and vehicles used in carrying on various municipal activities, have to obtain chauffeurs' licenses as distinguished from operators' licenses?
2. Do employees of any private corporation hired for the principal purpose of driving trucks or other motor vehicles have to have chauffeurs' licenses as distinguished from operators' licenses?
3. Are policemen or firemen operating police cars and fire trucks incident to their duties, required to have chauffeurs' licenses?
4. Are persons whose duties include the operation of motor vehicles of their employer, but who are not hired for the principal purpose of operating such motor vehicles, required to have chauffeurs' licenses?

The above questions and many others must be answered by determining, in any given case, whether the person operating the motor vehicle is *employed* for the *principal purpose* of operating the motor vehicle. It would be my opinion that municipal employees or employees in a private industry, hired as

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truck drivers to convey persons and property from place to place, must have chauffeurs' licenses. On the other hand, policemen who are hired for the principal purpose of enforcing the penal laws, and firemen who are hired for the principal purpose of preventing and extinguishing fires, would not be required to have chauffeurs' licenses merely by reason of the fact that their employment contemplates the operation of motor vehicles to accomplish the principal purposes of such employment.

In each case, the principle which determines whether a chauffeur's license must be obtained is whether the person is hired principally as a *driver* of a motor vehicle. If that is the principal purpose of his employment, he must obtain a chauffeur's license. If, on the other hand, a person is hired for the principal purpose of doing something other than driving, but is required to drive a motor vehicle in the course of such employment, he is not required to have a chauffeur's license.

September 13, 1939.—O-471-1.

FLORIDA DRIVERS' LICENSE LAW—SPECIAL CHAUFFEURS'
LICENSES FOR PERSONS BETWEEN 18 AND 21
YEARS OF AGE MAY BE ISSUED

Dear Sir:

This is in reply to your letter of September 13, which reads in part as follows:

"In your opinion could a special chauffeur's license be issued to a person over eighteen and under twenty-one years of age to operate a school bus. I am being called upon by the County Judges for information on this subject and if it is possible for you to give me an early opinion in the matter, it will help us in getting the licenses issued."

Subsection (a) of Section 18 of Chapter 19551, Acts of 1939, reads as follows:

"(a) *No person who is under the age of 21 years shall drive any motor vehicle while in use as a school bus for the transportation of pupils to or from school, nor any motor vehicle while in use as a public or common carrier of persons or property, nor in either event until he has been licensed as a chauffeur and received a special chauffeur's license.*" (Italics ours.)

The provisions of Subsection (a) of Section 18 are not as clear as they could be. A considerable controversy has arisen concerning the proper construction of such provisions. The contention has been made that they should be so constructed as to prohibit persons under the age of 21 years from driving school buses and public carriers and requiring all drivers of such motor vehicles to obtain both chauffeurs' and special chauffeurs' licenses. At first glance, such a construction seems to be well founded, but a careful analysis of the statutory provisions will reveal that it is not tenable. The requirement of a "special chauffeur's license" relates to a person "who is under

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the age of 21 years." This is readily apparent when we substitute for the pronoun "he" following the word "until" the noun to which the pronoun "he" relates. That noun is "person" which is modified and limited by the words, "who is under the age of 21 years." After making this substitution, the provisions of the law would read as follows: "No person who is under the age of 21 years shall drive any motor vehicle while in use as a school bus for the transportation of pupils to or from school, nor any motor vehicle while in use as a public or common carrier of persons or property, nor in either event until (such person who is under the age of 21 years) has been licensed as a chauffeur and received a special chauffeur's license."

Since chauffeurs' licenses cannot be issued under the provisions of Section 17 of the Act to persons under the age of 18, it would follow that persons over the age of 18 years and under 21 years are authorized to operate school busses under chauffeurs' licenses and special chauffeurs' licenses, as prescribed in Section 18 of the Act.

October 4, 1939—O-27.

**MOTOR VEHICLES—CIRCUMSTANCES UNDER WHICH TRACTORS
AND TRACTORS WITH TRAILERS ARE SUBJECT UNDER
SECTION 1280 C. G. L.—SECTION 1281, C. G. L. SUPP.**

Dear Sir:

This will supplement my opinions to you under dates of January 18, 1939, and February 21, 1939, respectively.

The enforcement of the motor vehicle licensing statutes, with regard to farm tractors that are used for motor vehicle purposes, has been attended by considerable confusion.

In my opinion dated January 18, 1939, I enumerated the instances in which there is no motor vehicle tax liability. The principle underlying that opinion, as well as the opinion of the Supreme Court in the case of *Hart v. Stinson*, 185 So. 139, is that under ordinary circumstances a farm tractor is not a motor vehicle. Under unusual circumstances, however, it would be susceptible of usage as a motor vehicle and, when so used, should be taxed as a motor vehicle.

Before stopping a farm tractor and making an arrest, your inspectors need ascertain either of two things: first, whether the tractor or tractor with trailer is transporting other than agricultural materials, or, second, whether it is travelling on the highways other than on a route from a farm, grove, farm or grove headquarters, or farm home, to a farm, grove, farm or grove headquarters, or farm home.

I find, upon investigation, that the mere fact that a farm tractor is operated by a co-operative or commercial grove-tending operator does not necessarily mean that the tractor uses the highways excessively. That portion of my opinion dated February 21, 1939, indicating that the ownership of a

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farm tractor by such a co-operative or commercial operator makes the tractor subject to motor vehicle license tax is, therefore, expressly overruled.

October 6, 1939—O-471-3.

**LICENSE TAX—DRIVERS LICENSE—EMPLOYEES OF FEDERAL
GOVERNMENT NOT REQUIRED TO HAVE UNDER
CHAPTER 19551, IN ORDER TO DRIVE GOV-
ERNMENT-OWNED VEHICLES**

Dear Sir:

You request my opinion as to whether operators of vehicles owned by the Federal Government must, in order to drive such vehicles, obtain a license under the provisions of Chapter 19551, Laws of Florida, Acts of 1939, known as the Florida Drivers' License Law.

I find that this question has been answered by the Supreme Court of the United States, in the case of *Johnson v. State of Maryland*, 254 U. S. 51.

It was decided in that case that a law of a State penalizing those who operate motor trucks on highways without having obtained licenses based on examination of competency and payment of a fee, can not constitutionally apply to an employee of the Post Office Department while engaged in driving a government motor-truck over a post-road in the performance of his official duty.

Based on the aforesaid decision of the Supreme Court of the United States, it is my opinion that an operator of a government-owned motor truck does not have to obtain a State drivers' license in order to drive such motor vehicle in the performance of his official duty.

October 7, 1939—O-596.

**DRIVERS' LICENSE—ISSUANCE OF LICENSE BY COUNTY JUDGE
OF ONE COUNTY TO RESIDENT OF ANOTHER
COUNTY AUTHORIZED**

Dear Sir:

You request my opinion concerning substantially the following question:

In many instances, persons residing in one county are obtaining drivers' licenses from County Judges of other counties. Is this in violation of Chapter 19551, Laws of Florida, Acts of 1939, known as the Florida Drivers' License Law?

Under the provisions of Section 33 of that Act, the County Judge acts in the capacity of agent for the Department of Public Safety in issuing licenses. There is no express provision limiting the authority of the County Judge to issuing licenses only to residents of his county, nor would this conclusion be required by implication from the provisions of the statute. The essential purpose to be accomplished is the licensing of drivers throughout the State.

TAXATION — License Tax

January 8, 1940—O-693.

ALL BOATS ENGAGED IN FISHING IN THE SALT WATERS OF
THIS STATE ARE REQUIRED TO PAY LICENSE*Dear Sir:*

In reply to your letter of the 6th inquiring as to whether or not all boats that ply in or operate in the salt waters of Florida that have anything whatever to do with fishing are required to pay a license as required by Chapter 17917, Laws of Florida, 1937, I would state that Section 1 of said Act provides in part as follows:

"Section 1. That from and after the passage of this Act, there shall be a license required of all boats engaged in or having to do with fishing, such boats being defined as all boats, vessels, schooners and launches that ply in or operate in the tide or salt waters of the State of Florida, engaged in any way in fishing or transporting fishermen or fishing parties or otherwise having to do with fishing or sea foods or other products of the sea or salt waters of the State of Florida."

This language means just what it says and it is clear therefrom that all boats which ply in or operate in the tide or salt waters of the State of Florida engaged in anyway in fishing or otherwise having to do with fishing in salt waters of this State shall pay the license prescribed by this Act. The license required by this Act might be compared to a license required for fishing. It appears to me that this license is a tax on the privilege of using a boat for the purpose of catching fish in the salt waters of this State.

January 29, 1940—O-711.

NON-RESIDENTS UNDER AGREEMENT TO OBTAIN BENEFIT
UNDER CHAPTER 19479, ACTS 1939, MUST THEM-
SELVES OPERATE MOTOR VEHICLES*Dear Sir:*

You request my opinion with regard to substantially the following state of facts:

A Delaware corporation, with its principal place of business in Jacksonville, Florida, is engaged in the transportation of motor vehicles in interstate commerce over irregular routes. The corporation does not own any equipment except three semi-trailers, which it does not operate in the State of Florida. It adopts the plan of leasing its equipment under a form of lease agreement from persons, some of whom are residents of the State of Florida, and others are residents of the States of North Carolina and Michigan. The equipment so leased is registered in the names of the owners in the respective States and carries the license tags of such respective States. Such license tags are purchased by the owners and are part of the leased equipment.

TAXATION — License Tax

Vehicles so leased from residents of North Carolina are operated into the State of Florida, but no farther south than Jacksonville.

The question to be determined is whether the equipment owned by residents of North Carolina, bearing North Carolina license tags, as above stated, and operated by the corporation here considered under lease agreements, as aforesaid, must be registered and licensed in the State of Florida. In other words, would a reciprocal agreement authorized under Chapter 19479, Laws of Florida, Acts of 1939 apply to vehicles owned by nonresidents but not operated by them?

No agreement entered into pursuant to said Chapter 19479 can go beyond the legislative intent therein expressed. It is clear that said statute authorizes " * * * reciprocal agreements whereby residents of such other States *operating* motor vehicles properly licensed and registered in their respective State, may have such privileges and exemptions in the operation of their said motor vehicles in this State, as residents of this State may have and enjoy in the *operation* of motor vehicles duly licensed and registered in this State in such other States; * * *."

Since the motor vehicles concerning which you inquire are not *operated* by the North Carolina owners, they could not come within the scope of any agreement authorized under said Chapter 19479. You must look to the status of the corporation which actually leases and operates the equipment to determine whether there is liability for a motor vehicle tax under the laws of Florida. In the particular instance concerning which you inquire, it would be my opinion that the motor vehicles must be registered and have license tags under the laws of Florida.

February 9, 1940—O-727.

DEALERS IN CONCH SHELLS REQUIRED TO PAY

Dear Sir:

This is in reply to your letter of January 26th, in which you ask to be advised as to the authority of the Department of Conservation, under Chapter 19611, Acts of 1939, to collect a license tax from dealers in salt water products other than seafoods. Your letter points out that persons are catching conchs in waters along the Florida Keys, and after destroying them, transporting the shells up the State for sale at good prices. As a result of this practice, your letter states, the supply of conchs is becoming depleted.

In order to answer your inquiry, it is necessary to examine not only the previously mentioned Act, but also the state of the law existing at the time of its enactment.

An examination of Chapter 17914, Acts of 1937, an Act regulating the seafood industry, discloses that a license tax was imposed thereby upon wholesale and retail dealers in seafoods, while other salt water products were not included or referred to in the Act. This Act also exempted from its opera-

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tion certain seafoods, namely, oysters, clams, and wilkes. Such was the state of the law at the time Chapter 19611, Laws of Florida, Acts of 1939, was enacted.

The 1939 Act is, according to its title, "An Act Relating to and Regulating Dealing in Seafoods and Salt Water Products * * * ." Throughout the title and body of the Act the words, "seafoods and salt water products" are used many times.

In view of the consistent use of this language, the conclusion that the Legislature meant to license and regulate dealers in "salt water products," cannot be escaped. The Act specifically enumerates oysters, clams and wilkes as being within the provisions of the Act, though they had been specifically exempted by the 1937 Act. To summarize briefly, the 1939 Act was passed to change the law as it then existed, by licensing and regulating dealers in salt water products other than seafoods, and by licensing and regulating dealers in oysters, clams and wilkes which had been previously exempt.

Bearing this in mind, we come to a detailed examination of the 1939 Act. Section 2 defines a wholesale seafood dealer as "any person, firm or corporation * * * dealing in fish, seafoods, or salt water food products of any kind * * * ." Section 3 defines a retail seafood dealer as "any person, firm or corporation * * * who deals in or sells fish, seafood, or any salt water products * * * directly to the consumer."

A conch shell from which the conch has been removed is obviously not a food product, but it is undoubtedly a "salt water product." It would seem unreasonable to suppose that the Legislature meant to regulate and tax one who sells conch shells at retail, and leave unregulated and untaxed the wholesale dealer in these shells. This conclusion is further borne out by the title and by the wording of the Act as a whole, in which many references are made to "salt water products," and only once (Section 2) is the expression "salt water food products" referred to.

A strict literal interpretation of the quoted language of Section 2 results in mere redundancy, for a salt water food product would either be fish or seafood, while the words "salt water products" include other things in addition to fish and seafood.

From a reading of the entire 1939 Act, and a consideration of the state of the law as it existed prior thereto, I am of the opinion that the word "food" was inadvertently included in Section 2, and that it was the intention of the Legislature to require wholesale dealers in salt water products other than food products to pay a license tax and be covered by the provisions of the Act.

The question now arises as to whether or not the courts may give effect to that intention in construing a statute, even though it may conflict with the literal meaning of certain language used therein. I am of the opinion that it may. 59 Corpus Juris 992 provides as follows:

"While, as a general rule, every word in a statute is to be given force

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and effect, words inadvertently used, words to which no meaning at all can be attached, or words having no meaning in harmony with the legislative intent as collected from the entire Act, will be treated as surplusage, and will be wholly disregarded in the construction of the act in order to effectuate the legislative intent: * * *."

In *Curry v. Lehman*, 47 So. 18, Text page 20, the Supreme Court of Florida held:

"The intention of the Legislature, however, in enacting a law, is the law itself, and must be enforced, when ascertained, although it may not be consistent with the strict letter of the statute. The court will not follow the letter of a statute when it leads away from the true intent and purposes of the Legislature and to conclusions inconsistent with the general purpose of the Act.

"‘Intent is the spirit which gives life to a legislative enactment.’ The intent is the vital part, the essence of the law, and the primary value of construction is to ascertain and give effect to that intent. Undoubtedly the general rule of statutory construction is that the intent of the lawmakers is to be found in the language that has been used and the courts have no function of legislation, but simply seek to ascertain the will of the Legislature. If, however, from a view of the whole law, or from other laws in *pari materia*, the evident intention is different from the literal import of the terms employed to express it in a particular part of the law, that intention should prevail, for that, in fact, is the will of the Legislature. The evil to be corrected, the language of the Act, including its title, the history of its enactment, and the state of the law already in existence bearing on the subject, are all properly considered by the court in arriving at the legislative intention, because the Legislature must have resorted to the same means to arrive at its purpose."

Substantially the same language is used in a later Florida case, *Payne et al. v. Payne*, 89 So. 538, Text page 539:

"Statutes must be so construed as to give effect to the evident legislative intent, even if the result seems contradictory to rules of construction and the strict letter of the statute; particularly does this rule apply when a construction based upon the strict letter of the statute would lead to an unintended result that defeats the evident purpose of the Legislature. *Knight & Wall Co. v. Tampa Sand Lime Brick Co.*, 55 Fla. 728, 46 South. 285."

For the foregoing reasons, I am of the opinion that the 1939 Act authorizes the collection of a license tax from dealers in salt water products other than seafood. This would, of course, include dealers in conch shells.

TAXATION — License Tax

February 15, 1940—O-736.

**MOTOR VEHICLES—GOVERNOR MAY REQUEST PUNISHMENT
BE NOT IMPOSED FOR FAILURE TO PROCURE TAG***Dear Sir:*

Because of the great loss to many citizens of the State resulting from the freeze in January of this year and of the emergency created thereby, you have requested my opinion as to your authority and power to extend the time in which owners of motor vehicles may procure their license plates therefor from February 15th to March 1st, 1940.

The license year for motor vehicles runs from January 1st to and including December 31st and each year.

Section 1284 of the Compiled General Laws of Florida, 1927, as amended, provides that the operation of any motor vehicle after the 15th of January without having attached thereto a license tag for the current year, shall subject the operator thereof to arrest and punishment as provided by law for the operation of a motor vehicle without a proper license.

It is further provided:

"The time for the operation of any motor vehicle for the current year may be extended by the Governor from January 15th of the current year for a period of thirty days, if within his judgment and discretion an emergency exists justifying the thirty days extension period."

There is no authority of law whereby you may extend the time for the operation of motor vehicles beyond the thirty-day period from January 15th. However, as Chief Executive whose duty it is to see that the laws are enforced, you might, because of the emergency, suggest and even request that no arrest be made for punishment imposed for failure to procure automobile license tags prior to March 1st of the current year.

July 6, 1940—O-861.

**MOTOR VEHICLES—REGISTRATION TAX CONSTITUTES FIRST
LIEN—ENFORCEMENT***Dear Sir:*

You request my opinion with regard to several propositions. The first one may be stated as follows: A Motor Vehicle License Inspector placed a motor vehicle in storage due to the fact that the vehicle was not properly licensed and the registration tax for the current year had not been paid. The owner of the garage in which the vehicle was stored desires to sell the vehicle for storage charges. What are the rights of the Motor Vehicle Department and the rights of the warehouseman?

To begin with, it is my opinion that a Motor Vehicle License Inspector has no authority to seize a motor vehicle and place it in storage. The

TAXATION — License Tax

remedies for failure to pay the registration tax on motor vehicles are limited to (1) arrest of person operating the vehicle without proper license, and (2) enforcing the lien of the Motor Vehicle Department against the automobile for the amount of the license tax due.

The following are provisions contained in Section 1011 Revised General Statutes, as amended by Chapter 8410, Acts of 1921, Chapter 10182, Acts of 1925, Chapter 15625, Acts of 1931, and Chapter 16085, Acts of 1933:

"The registration tax required under this Chapter when not paid, shall constitute a first lien upon the motor vehicles against which the same is chargeable, which lien shall be superior to all other liens upon such motor vehicle, and may be enforced and collected if delinquent more than thirty days by levy and sale in the same manner as under an execution of law on the amount of the tax due, which enforcement may be under a tax warrant issued for that purpose by the State motor vehicle commissioner and enforced in like manner as is provided by law for the enforcement of tax warrants by the Comptroller under Section 1273."

From the statutory provisions above set forth, it is apparent that the registration tax is a first lien on the vehicle concerning which you inquire and that it may be enforced under a tax warrant issued by you. I enclose a suggested form of tax warrant. (See form at end of this letter). I cannot express any opinion with regard to the rights of the warehouseman, because that is strictly a private matter, except to say that any lien asserted by him would necessarily be subject to the prior lien of the Motor Vehicle Department for the registration tax.

You next inquire concerning substantially the following problem: A State highway patrolman arrested two negroes for driving while intoxicated. He took them from the car in which they had been travelling on the public highways, and left the car at a place of business in Port Orange, Florida. What are the rights of the highway patrol under such circumstances?

Answering this inquiry, it is my opinion that a State highway patrolman may very properly take intoxicated persons from the cars being operated by them. He does not have the right, however, to incur bills for storage which would have to be paid by the owner before recovering the automobile.

TAX WARRANT

(Under Section 1011, Revised General Statutes of Florida, as amended by Chapter 8410, Acts of 1921, Chapter 10182, Acts of 1925, Acts of 1931, and Chapter 16085, Acts of 1933.)

THE STATE OF FLORIDA.

To the Sheriff of.....County, Florida:

You are hereby directed and commanded to collect by levy and sale, in the same manner as under an execution of law, upon the following described motor vehicle:.....within your jurisdiction, the following amount due on said vehicle for registration tax under the

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statutes of Florida, to-wit, \$....., together with the cost of executing this warrant, and pay to me, the said D. W. Finley, as Motor Vehicle Commissioner of the State of Florida at my office in Tallahassee, Florida, the amount due for reigstration tax as above set forth.

The amount of registration tax above stated is for the year..... and same has been delinquent for a period of more than thirty days prior to the issuance of this warrant.

Herein fail not.

WITNESS my hand and official seal at Tallahassee, Florida, this..... day of....., A. D. 194.....

.....
Motor Vehicle Commissioner.

July 13, 1940—O-865.

COUNTY VOTING DRY DOES NOT CANCEL OUTSTANDING
LICENSE

Dear Sir:

This will acknowledge receipt of your letter of July 10, requesting an opinion upon the following:

"If a county that now permits the sale of beverages regardless of their alcoholic content, commonly known as a 'wet county,' should in a legal manner call and hold a local option election at which election a majority of the voters should cast their vote against the sale of intoxicating beverages, which would place it in what we term the 'dry county' column, would such action of the voters nullify or cancel licenses to sell intoxicating beverages in such county as of the date the result of such election was properly certified, or would such licenses be legal until their expiration date?"

In reply I wish to advise that the Supreme Court has apparently settled the rule with regard to the effect of an adverse vote in a county referendum upon slot machines and this rule, it seems to me, would also apply in the present situation. The Court said:

"I agree with Mr. Justice Buford in his conclusion that elections held under Section 12-A operate in future only, and that they have no effect as a wiping out of licenses already outstanding and paid for at the time of the voting, until the period taxed and paid for the enjoyment of the license has run. To hold otherwise, even if the language of the Act were susceptible of that construction, which I do not think it is, might render the section subject to the very criticism of unconstitutionality leveled against it as an unlawful delegation of legislative power to the voters of individual counties to affect the state revenues, since the denial of a privilege paid for in advance of the expiration of the license period would impose the moral, if not the legal, duty on the Legislature to refund to the holders of unexpired licenses the money paid into the state treasury for the unused portion of the

TAXATION — License Tax

licenses canceled or recalled ante the date of their expiration." State ex rel. McLeod v. Harvey, et al., 170 So. 153.

November 19, 1940—O-988.

**PERSONS IN TRAINING AT MILITARY CAMPS IN STATE
ELIGIBLE TO ACQUIRE "RESIDENT" HUNTING
AND FISHING LICENSES**

Gentlemen:

You request my opinion with regard to the residential status of men brought into the State of Florida for training at the various training camps in this State, insofar as obtaining licenses for fishing, hunting and trapping is concerned. Under the provisions of Section 20 of Chapter 13644, Laws of Florida, Acts of 1929, as amended by Chapter 17015, Acts of 1935, and as further amended by Chapter 19509, Acts of 1939, the license fee to be charged residents of the State of Florida is considerably less than that to be charged nonresidents.

It is my understanding that persons who are in training at the military camps in Florida are assigned to such camps for a period of at least a year. This, in my opinion, would constitute them residents of Florida insofar as the provisions of our laws relating to licenses for fishing, hunting and trapping are concerned. As pointed out by the Supreme Court of Florida, in the case of Robinson v. Fix, 151 So. 512, there is a distinction between the residence of a person and his legal domicile. The following is from the opinion of the Supreme Court in that case:

"“Residence” simply indicates place of abode whether permanent or temporary, whereas “domicile” denotes fixed permanent residence to which when absent one intends to return. Terms “domicile” and “residence,” though frequently used synonymously, are not when accurately used convertible terms; “domicile” being a more extensive signification as it includes beyond mere physical presence and particular locality positive or presumptive proof of intention to constitute it a permanent abiding place, whereas “residence” has more limited, precise, and local application than “domicile,” which is used more in reference to personal rights, duties, and obligations.” Minick v. Minick (Fla.) 149 So. 483, 484, headnote 7.”

SECTION 8

Taxation — Poll Tax

July 20, 1939—O-486.

MUNICIPALITIES NOT AUTHORIZED TO IMPOSE AS
PREREQUISITE FOR VOTING*Dear Sir:*

I am in receipt of your letter of the 19th, in which you inquire as follows:

"I would like to have your opinion as to whether a municipality has authority to impose a poll tax as a prerequisite for voting in a municipal election."

Section 18061, Laws of Florida, 1937, provides as follows:

"Section 1. That the payment of a poll tax shall not be required of any person, otherwise qualified as an elector, to vote at any primary, special, general, or other election hereafter held in this State under the Constitution or any statutes passed in pursuance thereof.

"Section 2. All laws or parts of laws in conflict herewith are hereby expressly repealed."

It is my opinion that the phrase "or other election hereafter held in this State under the Constitution or any statutes passed in pursuance thereof" includes municipal elections and therefore that a municipality does not have authority to impose a poll tax as a prerequisite for voting in a municipal election.

SECTION 9

Taxation—Tangible Personal Property Tax

December 28, 1939—O-679.

NATIONAL BANKS EXEMPT

Dear Sir:

This will acknowledge receipt of your letter of December 22 * * * requesting my opinion as to the taxation status of tangible personal property owned by a national bank but leased and operated by a private concern.

In reply I wish to advise that I have examined the Federal Statutes that permit taxation by a State of property owned by national banks, and I find that the State can only tax property of national banks as provided by Section 548, Title 12, U. S. C. A., Banks and Banking, and that there has been no provision for the taxation of personal property belonging to a bank. The courts have held that the effect of this Section is to exempt personal property belonging to national banks. See *Rosenblatt v. Johnson*, 104 U. S. 462, 26 L. Ed. 832, and cases cited under Note 43 of the Section of the United States Code I have above referred to.

It would therefore appear to me that if the personal property of a national bank is exempt from taxation, it is upon the theory that it is property belonging to a national bank and since these banks are agencies of the United States created under its laws, a State can only tax a national bank where so permitted by specific Act of Congress, and it does not seem to make any difference how the property is being used, whether by the bank or the bank's lessee.

I might add that the trend of the recent decisions of the Supreme Court of the United States seems to indicate that this Court is about to depart from the doctrine announced in the case I have cited. However, up to the present I know of no case that has expressly overruled the previous holdings of this Court. The case I refer to as indicative that the Supreme Court of the United States is likely to overrule the case of *Rosenblatt v. Johnston*, 104 U. S. 462, 26 L. Ed. 832, are *The State Tax Commission of Utah, et al., v. W. Q. Van Cott*, decided on March 27, 1939, and the case of *Mark Graves, et al., etc., v. The People of the State of New York, Upon the Relation of James B. O'Keefe*, also decided on March 27, 1939.

Under these cases, the salaries of Governmental employees are no longer exempt from Federal and State income taxes and the Court in the *Graves* case has much comment on the effect of the silence of Congress with reference to whether or not a State may tax a governmental instrumentality. To that extent the opinion seems to be in conflict with *Rosenblatt v. Johnston*, *supra*. But as I have pointed out, since the Supreme Court has not directly overruled the case of *Rosenblatt v. Johnston*, *supra*, I feel that we must follow the same. However, if Mr. Lummus has any cases that he would like to call my attention to, I will be very glad to consider the same.

SECTION 10

Taxation — Tax Certificates

January 9, 1939.—O-37-8.

CANCELLATION WHEN STATE OWNED AGAINST
STATE-ACQUIRED LAND*Dear Sir:*

This will acknowledge receipt of your letter of January 6 requesting my interpretation upon the following question:

When a State department obtains fee simple title to property upon which there are outstanding tax certificates held by the State, are same automatically cancelled thereby?

In reply I wish to advise that under date of November 22, 1935, this office answered a similar question propounded by the Trustees of the Internal Improvement Fund. See text page 96 of the 1935-1936 Biennial Report of the Attorney General. I quote therefrom:

"In reply to your questions I beg to say that in my opinion the vesting of title to said lands in the Trustees of the Internal Improvement Fund with delinquent taxes cancelled, except as to State taxes, would not have the effect of cancelling the outstanding delinquent State taxes against said lands, and said State taxes may not be cancelled under our present laws except by payment of the same."

I do not know of any law that has changed what is said above. On the contrary, I find in each instance where taxes have been cancelled that there is statutory authority for same. See Chapter 17426, Acts of 1935, providing for the cancellation of certain liens for taxes held and owned by the State of Florida, against certain lands in this State acquired by the public for aeronautical purposes. See Chapter 17424, Acts of 1935, providing for the cancellation of certain liens for taxes held by the State of Florida against certain lands in this State, acquired or contracted for purchase thereof by the United States or any duly constituted agency thereof for reforestation or game preserve purposes, or military aviation purposes. See also Chapter 17459, Acts of 1935, providing for the cancellation of certain liens for taxes held and owned by the State of Florida, against certain lands in this State, acquired by the duly constituted authorities of this State for public road purposes.

Chapter 17027, Acts of 1935, which authorizes the Florida Board of Forestry to purchase land, et cetera, does not contain a provision authorizing the cancellation of tax certificates held by the State of Florida on land purchased under the authority of said Act.

It would, therefore, be my suggestion to you that you secure passage of an Act similar to the State Road Department Act above referred to.

TAXATION — Tax Certificates

March 6, 1939—O-77.

**COMPTROLLER NOT AUTHORIZED TO WAIVE INTEREST
WHEN OWNED BY STATE***Dear Sir:*

This is in reply to your letter of March 3, 1939, reading as follows:

"I am enclosing a resolution of the Board of County Commissioners of Palm Beach County, dated February 17, 1939. It describes certain tax sale certificates on lands located in Lake Worth Drainage District, which district is wholly within said county.

"The resolution recites that through the Reconstruction Finance Corporation the district has acquired sufficient funds to pay the certificates, exclusive of interest and penalties, and that the whole rehabilitation program of the district depends upon the acquisition of these certificates. The resolution agrees to sell them to the district at face value, exclusive of interest and penalties, subject to the approval of the Comptroller.

"Please let me have your written opinion as to my authority to give approval to the proposed sale."

I find no statute authorizing the Comptroller to waive the collection of statutory interest and fees payable upon the sale of State-owned tax sale certificates. I am, therefore, of the opinion that the Comptroller is not authorized to approve the proposed sale of tax sale certificates outlined in the resolution of the Board of County Commissioners. See *Draughon, et al., v. Shultz*, 173 So. 360.

January 24, 1939—O-20.

**EXPIRATION DATE OF CHAPTER 18296, ACTS OF 1937—
MURPHY ACT***Dear Sir:*

In reply to your letter of January 20, requesting my opinion as to whether or not, due to the fact that this Act expires on June 10, 1939, all procedure authorized in the Act must be completed by the date of the expiration of the Act, I would state that in my opinion all procedure outlined in the Act with reference to the purchase of outstanding tax certificates must have been completed by the expiration date of the Act,—that is, June 10, 1939—except that procedure outlined in Section 6 of the Act which allows the purchaser of tax sale certificates under this Act to apply for a deed at the expiration of two years and allows the owner of lands upon which tax sale certificates have been purchased under this Act to redeem them at any time within three years. This construction of the Act is substantiated by the second paragraph of Section 9 which is as follows:

TAXATION — Tax Certificates

"After the expiration of two years from date this Act shall become a law no court in this State, either Federal or State, shall have jurisdiction to entertain any suit brought by the former owner of said land or anyone claiming by, through or under him for the purpose of questioning, or in any way litigating or contesting the title of the State of Florida, or its grantee to said land."

This statute is repealed two years after it becomes effective by its own provisions, and in 59 C. J., page 1189, the following rule is found, governing this question:

"As a general rule, the repeal of a statute without any reservation takes away all remedies given by the repealed statute and defeats all actions and proceedings pending under it at the time of its repeal.

See also the case of *Bryant v. Kentucky Lbr. Co.*, reported in 139 S. W., page 1089, where the rule is laid down as follows:

"The rule is that under statutes conferring privileges on private individuals for a certain period of time the privilege cannot be exercised after the time allowed."

It is therefore my opinion that if there remains anything to be done in order to effectuate a purchase of tax sale certificates under this Act after the expiration of June 10, 1939, that a sale cannot be perfected regardless of whether or not application was made before the date of the expiration of the Act.

July 7, 1939—O-446.

EXTENSION OF REDEMPTION PERIOD—EFFECT OF THE
FUTCH LAW, CHAPTER 16252, ACTS OF 1933, WITH
REGARD TO THE MURPHY LAW, CHAPTER
18296, ACTS OF 1937

Dear Sir:

This will acknowledge receipt of your letter of June 29, propounding the following question:

"With further reference to Section 9 of Chapter 18296, Acts of 1935, your attention is called to Section 4 of Chapter 16252, Acts of 1933, with the request that you advise me whether or not the person who has complied with Section 4 of Chapter 16252 still has the privilege of redeeming prior years delinquencies despite the enactment of Section 9 of Chapter 18296."

The two sections involved are Section 4 of Chapter 16252, Laws of 1933, and Section 9 of Chapter 18296, Laws of 1937.

Section 4 of Chapter 16252 provides:

"The provisions contained in Section 1 of this Act, shall on July 1, 1937,

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be extended for an additional period of fifteen (15) years, as to all lands upon which the taxes assessed for the years 1932, 1933, 1934, 1935 and 1936 shall have been paid in full prior to said July 1, 1937."

Section 9 of Chapter 18296, Laws of 1937, provides:

"This Act shall remain in full force and effect for two years from the date same shall become a law and at expiration of such four-year period, then the fee simple title to all lands, against which there remains outstanding tax certificates which on the date this Act becomes a law, are more than two years old, shall become absolutely vested in State of Florida * * *."

It will be noted that the intention behind both these Acts of the Legislature was to restore to the tax books lands that were not being assessed for taxes because the State of Florida held a tax certificate covering the same. As a matter of fact, the Supreme Court so held with reference to Chapter 16252. See *State v. Butts*, 149 So. 746. And in the preamble to Chapter 18296 this language was written into the Act.

I am therefore of the opinion that these two Acts should be reconciled, if possible, so that the intention of the Legislature would be carried into effect, and that for this purpose the two Acts should be read in *pari materia*. To use the language of the Court as to the interpretation or the construction of statutes, I quote from *Dade County v. City of Miami*, 82 So. 354, 77 Fla. 786, where the Court said:

"An interpretation leading to implied repeal of a law should not be adopted, unless it is inevitable: the rule of construction being that if court can by any fair, strict or liberal construction find for the two provisions a reasonable field of operation without destroying their evident intent, preserving form of both and construing them together in harmony with whole course of legislation, it is its duty to do so."

When this is done I find no conflict between the two in the matter of the effect of Section 9 of Chapter 18296, because I do not believe it was the intention of the Legislature by this Section to foreclose the rights of any taxpayer who had availed himself of the provisions of the Futch Act, Chapter 16252, Laws of 1933, but that this taxpayer should still be allowed the privileges that he had acquired by virtue of having performed the conditions set forth in the Futch Act, and that Chapter 18296 was intended to operate only upon those tax certificates that had not come within the provisions of the Futch Act by the performance of the conditions precedent of said Futch Act.

Therefore, it is my opinion that persons who have complied with Section 4 of Chapter 16252 still have the privilege of redeeming prior years' delinquencies, despite the enactment of Section 9 of Chapter 18296, Laws of 1937.

In my opinion to you under date of June 15 I did not at that time go into this question, so said opinion is hereby amended by adding thereto the contents hereof.

TAXATION — Tax Certificates

November 4, 1939—O-646.

**CANCELLATION ON LANDS CONVEYED TO THE
TRUSTEES I. I. FUND***Dear Sir:*

I am in receipt of your letter of the 27th ultimo, the body of which reads as follows:

"I am attaching hereto a letter just received from Hon. F. N. K. Bailey, president of the DeSoto State Park. This letter refers to the subject of cancellation of tax certificates affecting the sale of property of the Highlands Hammock State Park, Sebring, Florida.

"I am requesting your opinion as to how to secure the cancellation of the tax certificates, a list of which is attached hereto. I will appreciate it very much if you will kindly return Colonel Bailey's letter with your reply."

It appears by a communication from Mr. F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund, that the said Trustees, a State agency, have title to the lands in question for the purposes of a State Park and that the county taxes on such lands have already been cancelled under Acts of the Legislature.

In 61 C. J., page 945, Taxation, 1213, we find this language:

"A tax lien is merged in the ownership in fee of the land when the State becomes the owner by escheat, by taking under eminent domain, or purchase at a tax sale."

I also quote from *State v. Locke* (N. M.), 219 Pac. 790, as follows:

"The property in question was freed and absolved from further liability for the taxes previously assessed against it, the moment it was acquired by the State. Prior to that time, the State merely held a lien against such property to secure the unpaid taxes so previously assessed, and this lien was merged into the ownership of the title in fee. That a lien, whether it be created by mortgage or otherwise, is merged into the title of the holder thereof the moment he acquires the fee to the property covered by such lien, is a proposition of law too well settled to merit the citation of authorities."

Your attention is also called to 30 A. L. R. 413, which contains the following language:

"With the exception of the Supreme Court of Michigan, the cases are agreed that where property, subject to the lien of a tax, is acquired by the State or any of its agencies for a public purpose, it thereby becomes freed from such lien, and further steps to enforce it are without effect."

From the above it appears that the lien of the outstanding State Tax certificates on the lands in question is merged into the title of the Trustees of the Internal Improvement Fund, a State agency, and that outstanding State tax certificates thereon may properly be cancelled.

TAXATION — Tax Certificates

November 6, 1940—O-981.

CERTIFICATES ISSUED ON PROPERTY OF TAMPA YACHT AND COUNTRY CLUB NOT SUBJECT TO CANCELLATION*Dear Sir:*

I have examined the file attached to your letter of the 4th instant relating to the question of whether the property of Tampa Yacht and Country Club was subject to taxation at the time of its assessment for State and county taxes for the year 1928 and subsequent years, which taxes were not paid, resulting in the sale of the property and the issuance of tax certificates to the State, which certificates were owned and held by the State on June 9, 1939.

It appears from a certificate of the Clerk of the Circuit Court for Hillsborough County that a part of the land involved was acquired by the Tampa Yacht and Country Club on January 26, 1910, and another part acquired November 10, 1938, from Tampa Electric Company. I note that it is claimed that this property was not subject to taxation, and that the tax certificates issued against same should be cancelled, and you request my opinion as to whether you should cancel same under authority of Section 1009, Compiled General Laws of Florida, 1927.

Section 1009 authorizes you to cancel tax sale certificates issued against land when it is certified to by the Clerk of the Circuit Court that the property was not subject to taxation at the time of the assessment, and if you are satisfied that it was not subject to taxation. Section 893 of the Compiled General Laws provides that all real and personal property in this State and all personal property belonging to persons residing in this State not expressly exempt therefrom shall be subject to taxation in the manner provided by law. The exemptions expressly provided for are found in Section 897, et seq., of the Compiled General Laws of Florida, and the property of Tampa Yacht and Country Club does not come within any classification of property expressly exempt from taxation.

It follows, therefore, that the property of Tampa Yacht and Country Club was subject to taxation at the time it was assessed for State and county taxes in the year 1928 and subsequent years, and therefore you have no authority under Section 1009 of the Compiled General Laws or otherwise to cancel the tax certificates in question.

December 28, 1939—O-686.

CONSTRUCTION CHAPTER 18296, ACTS OF 1937, WHEN TITLE TO PROPERTY HAS NOT REVERTED TO STATE*Dear Sir:*

In your letter dated December 23, 1939, you refer to the case of State ex rel. Garrett v. Gay, 183 So. 463, and thereupon you state:

TAXATION — Tax Certificates

"The question now arises as to whether or not the title to the property has reverted to the State in those cases where the lien for taxes was more than four years old on June 9, 1939, without a certificate having been issued for such lien and where subsequent years' taxes have not been paid, as required by Chapter 16252, as amended by Chapter 17403."

You then ask that I give you my opinion on this point.

It is my opinion that the only lands affected by the provisions of Section 9 of Chapter 18296, Laws of Florida, Acts of 1937, are those lands against which there remained outstanding tax certificates owned by and held for the State, which certificates were more than four years old on June 9, 1939.

As construed by the Supreme Court of Florida in *State ex rel. Hurner v. Myrtle M. Culbreath, et al.*, opinion filed October 6, 1939, the effect of Section 9, Chapter 18296, is to terminate the privilege to redeem title that had already vested in the State by Section 1027, Compiled General Laws of Florida, 1927, as appears from the following statement taken from said opinion:

"Section 9, Chapter 18296, terminates the privilege to redeem title vested in State by Section 1027, Compiled General Laws."

After reference to the history of the times which occasioned the enactment of Chapter 18296, and the opportunity thereby given the former owner to redeem his land by purchasing the certificate at competitive bidding therefor, and the effect of his failure to avail himself of the privilege of said Act, the Court then said:

"It will thus be seen that the real purpose of Chapter 18296 was not to divest in the first instance, but to give former owners a chance to redeem lands they had previously forfeited after every indulgence and constitutional right to save them had been extended but ignored."

The Court points out that the land represented by the certificate had already been sold and the title vested in the State with the privilege of redeeming as provided by law, and that the effect of Chapter 18296 was to extend that privilege on conditions more beneficial to the prior owner than had theretofore existed, that is as to the amount required to redeem, and that the failure to redeem prior to June 9, 1939, under the terms of Section 9 of said Act terminated that right to redeem, and made absolute the title which had theretofore vested in the State upon the sale of the land for the non-payment of taxes.

Therefore, answering your question more specifically, it is my opinion that the provisions of Section 9 of Chapter 18296 did not operate to vest title in the State as to lands where the lien for taxes was more than four years old on June 9, 1939, where there was no tax sale certificate owned by and held for the State, which was more than four years old on June 9, 1939.

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February 20, 1940—O-735.

**TITLE TO LAND COVERED BY OVERLOOKED CERTIFICATES—
DUTIES CLERKS CIRCUIT COURTS***Dear Sir:*

By your letter of the 15th instant and the accompanying copy of resolution of the Association of Circuit Court Clerks, and also from talking with the Honorable Fred C. Elliot, Secretary to the Trustees of the Internal Improvement Fund, I understand the following situation now exists:

In many instances there were two or more outstanding tax sale certificates against the same parcel of land, which certificates were subject to sale under the terms of the Murphy Act, and also in many instances the Circuit Court Clerks in making sales of certificates under the Murphy Act, omitted from the advertisement, receipt and report of sale one of such certificates, but listed and sold and delivered to the purchaser another certificate on the same parcel of land, including the subsequent and omitted taxes thereon, and that the certificates overlooked and not included in the advertisement, receipt and report to your office, were in some instances the oldest certificate outstanding, and that such certificates are still held by the Clerks.

The question presented by this situation, as I understand it, is whether the title to the land covered by such overlooked certificates, vested in the State by operation of Section 9 of Chapter 18296, and if not, what disposition should be made of same.

The answer to this question depends upon the correct understanding of the purpose to be accomplished by the provisions of Chapter 18296, Acts of 1937.

In *State ex rel, Hurner v. Culbreath, et al.*, decided October 6, 1939, Chief Justice Terrell said that many of the tax certificates subject to the provisions of the Murphy Act, were highly speculative assets, and that many of them had no value whatsoever. That "Chapter 18296 was devised as a means to auction off these certificates, and restore the lands to regular currents of proper value."

As I understand the intent of Chapter 18296 and the purpose to be accomplished thereby, it was to wipe the slate clean of all unpaid taxes represented by State-owned tax certificates which were more than two years old on June 9, 1937, including subsequent and omitted taxes.

Section 2 of Chapter 18296 made it the duty of the Clerks of the Circuit Courts of the State having custody or control of tax certificates held by the State that were more than two years old June 9, 1937, to offer such certificates, together with all subsequent omitted or levied taxes for sale at public outcry to the highest and best bidder for cash, after publication of the required notice, when written request was made therefor, such written request to give the description of the land covered. They were required to offer for sale and sell to the highest and best bidder for cash, "tax certificates covering the

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lands to be described in said notice, together with all omitted or subsequent levied taxes, including year for which said sale is made."

Obviously it was contemplated that where there were two or more tax certificates owned by the State against the same parcel of land, subject to sale under said Act, all such certificates would be sold, together with all subsequent omitted or levied taxes. It was never contemplated or intended that one certificate would be withheld or omitted from sale where another certificate covering the same parcel of land was sold under said Act, together with the subsequent omitted or levied taxes. When written application was made to the Clerk for the purchase of certificates under Chapter 18296, giving the description of the land covered thereby, and a deposit made in sufficient amount to cover all the advertising and other costs incident to making such sale, the applicant had performed every condition precedent to entitle him to an opportunity to purchase all the outstanding tax liens against such land represented by tax certificates owned by the State, any one or more of which was more than two years old on June 9, 1937.

At the sale following the advertisement of notice thereof, the matter of bidding was open to all parties interested, and the sale in contemplation of the terms of Chapter 18296 was of all the tax certificates owned and held by the State, any one or more of which was two years old on June 9, 1937, together with all subsequent and omitted taxes, and all such certificates should have been delivered to the purchaser and included in the certificate and report of the Clerk as well as in the notice preceding the sale, and an omission on the part of the Clerk to perform his duty in this respect cannot be visited upon the purchaser who intended to and thought he was purchasing all such outstanding certificates.

If the failure to include such overlooked certificates in the notice, receipt, and report of sale and failure to deliver same to the purchaser, when another certificate on the same land was sold under Chapter 18296, together with subsequent and omitted taxes, caused the title to the land embraced therein to vest in the State by operation of Section 9 of Chapter 18296, we would have the situation of the State taking the purchaser's money and giving him nothing in return through no fault of such purchaser—a situation which obviously was never intended by the Legislature in the enactment of Chapter 18296. It seems clear, therefore, that the title to land represented by such overlooked tax certificate in such sales as herein described, did not vest in the State by operation of Section 6 of Chapter 18296. This is so because equity regards as done that which should have been done.

The same principle would apply in the case of the owner under like circumstances redeeming under Chapter 18296.

The only question remaining to be determined is what disposition should be made of such certificates now in the hands of the circuit court clerks. At this point I note your request for an opinion as to whether such overlooked tax certificates are subject to cancellation, and also the desire of the circuit

TAXATION — Tax Certificates

court clerks evidenced by resolution of the Association of Circuit Court Clerks for an opinion as to your authority to authorize the clerks to cancel such overlooked certificates. I have given very careful consideration to this question, and have reached the following conclusions:

(a) If the original purchaser still owns the certificate purchased from the clerk on the same land covered by the overlooked certificate now in the hands of the clerk, such overlooked certificate should be delivered to such original purchaser.

(b) If the original purchaser has sold the certificate or certificates covering the same land, then the present holder of such certificate or certificates would be entitled to such overlooked certificate, and the same should be delivered to him.

(c) If a deed has been applied for and issued on the land involved, the overlooked certificate may and should be cancelled by the clerk as provided by law.

(d) If the owner of the land has redeemed the same from the purchaser of the certificate as provided by Chapter 18296, he has the right to have the overlooked certificate cancelled by the clerk.

(e) If the owner prior to June 8, 1939, under like circumstances as above stated, redeemed under provisions of Chapter 18296, the overlooked certificates may and should be cancelled.

January 26, 1940—O-700.

CONSTRUCTION MURPHY ACT, CHAPTER 18296—DUTIES
TAX COLLECTOR

Dear Sir:

At the meeting of the Committee of Tax Assessors of Florida in Tampa recently held, the following questions were propounded to you and me by the tax assessors:

1. Should not the Trustees of the Internal Improvement Fund make a return to the tax assessors showing all the lands vested in the State by virtue of Chapter 18296 or the Murphy Act?

2. Would it not be a good idea to show the valuation of the lands vested in the State under the Murphy Law in view of the fact that the lands might be liable for drainage taxes regardless of the fact that the lands are now vested in the State of Florida?

3. Are the Tax Assessors entitled to commissions on State owned lands up to and including the year 1939, and should not these commissions be included in the purchase price?

In answer to the first question, would state that the several clerks of the courts of the various counties have been instructed to make a list of the lands which vested in the State under the Murphy Law, and to furnish the tax

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assessors with a copy of these lands. It seems to me, when this is done, that this should be a sufficient return of the lands owned by the State. It, also, appears to me that the city tax assessors could use this return to show the lands owned by the State.

In answer to the second question, would state that in view of the Supreme Court's definite refusal to pass upon the question of whether or not drainage taxes were extinguished by the Murphy Law in the recent case of *Bice v. City of Haines City, et al.*, this question is still open and the courts might hold that the lands vested in the State are liable for drainage taxes, and in view of this possibility, it appears that it would be a good idea for the tax assessors to place the valuation of these lands on the tax rolls under the Murphy Law; especially is this true in the counties in which there are drainage districts.

In answer to the third question, would state that Section 9 of the Murphy Law provides that certain delinquent lands should vest in the State free and clear of every right, title, interest or lien of every kind and nature. It does not appear from this law, or any of the decisions construing it, that fees or commissions of tax assessors, tax collectors or clerks of the court, as such officers, may be collected from the proceeds of the sales of the lands vesting in the State under the law. How this question will be ultimately determined, I do not know.

February 23, 1940—O-737.

TRUSTEES I. I. FUND HAVE NO AUTHORITY IN PROPERTY COVERED BY OVERLOOKED CERTIFICATE

Dear Sir:

I acknowledge receipt of your letter of February 23, detailing the following situation, on which you request my opinion:

Some time during the year 1936, Mr. F. M. Hawkins, of Levy County, Florida, applied to the then Clerk of the Circuit Court for Levy County for a statement of all outstanding taxes against his property and, in response thereto, received from said clerk a letter listing such taxes and stating that same covered all outstanding taxes against the real property involved. Thereupon said F. M. Hawkins paid his taxes according to the statement given him by the clerk for the years 1934, 1935, and 1936, believing that said payment covered all past due and delinquent taxes on the property involved, such belief and understanding being based upon the statement given him by the said clerk as a basis for the payment of all such past due and unpaid taxes.

It further appears that in making up the statement as to past due and unpaid taxes on said property, the clerk overlooked a tax certificate based on a tax sale of said property for the year 1929 for unpaid taxes for the year 1928.

Recently when it was discovered that the 1929 tax certificate had not been

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included in the statement aforesaid and had not been redeemed prior to June 9, 1939, the said F. M. Hawkins endeavored to redeem same and tendered to the present Clerk of the Circuit Court of Levy County money in settlement therefor, which the clerk declined to accept because of the uncertainty as to whether the said overlooked and unredeemed tax certificate caused title to the land covered to vest in the State of Florida by operation of Section 9, Chapter 18295, Laws of Florida, Acts of 1937.

It seems clear to me, and I so hold, that under the circumstances, the title to the property involved in the said overlooked certificate did not vest in the State of Florida by operation of Section 9, Chapter 18296, Laws of Florida, Acts of 1937. The situation here presented is controlled by the provisions of Chapter 16252, Laws of Florida, Acts of 1933, as amended by Chapter 17400, Laws of Florida, Acts of 1935, and the Trustees of the Internal Improvement Fund have no authority or duty in the premises.

July 30, 1940—O-882.

**DISBURSEMENT OF FUNDS RECEIVED PURSUANT TO
CHAPTER 18313**

Dear Sir:

This is in reply to your letter of July 30, in which you quote Section 1 of Chapter 18313, Laws of Florida, Acts of 1937, and request my opinion as to whether or not funds remitted pursuant to that section may be properly placed in the General Revenue Fund, and disbursed as other moneys in the General Revenue Fund.

I am of the opinion that it is proper for the funds heretofore and hereafter received pursuant to said section, to be placed in the General Revenue Fund of the State of Florida, and disbursed as other moneys in such fund are disbursed.

All claims of tax certificate holders, properly established pursuant to the applicable statutes, will thereupon be payable from moneys in the General Revenue Fund.

October 17, 1940—O-956.

**AUTHORITY OF COMPTROLLER TO CANCEL UPON LANDS
OWNED BY COUNTY WHEN TAX ACCRUED PRIOR
TO VESTING OF TITLE IN COUNTY**

Dear Sir:

I am in receipt of your letter of the 10th, enclosing resolution and correspondence, in which you ask me to review an opinion of my predecessor in office dated February 27, 1934, and reported at page 117 of the Biennial Report of the Attorney General, 1933-34, in which it was held that you did

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not have authority to cancel that part of the tax sale certificate outstanding on lands owned by the county, which certificate was outstanding at the time the county acquired title to the land.

It appears from the correspondence and resolution that the county acquired title to the land in question on June 29, 1935, and that tax certificates were issued on August 5, 1935. The certificates represented taxes for the year 1934 which accrued prior to the vesting of title of the land in the county. It does not appear from the resolution that the county is holding this property for public purposes.

I have reviewed the opinion above referred to in light of the facts of the present case and it is my opinion that the former opinion should govern the facts in this case, and I do not think that you have authority to cancel these tax certificates. I further agree with you that you would have authority to cancel the 1936 and subsequent taxes upon this property only after assuring yourself that the property in question was used, or intended to be used, for public purposes.

SECTION 11

Taxation — Miscellaneous

April 11, 1939—O-147.

LEGISLATURE NOT AUTHORIZED TO PASS LOCAL LAW RE:
ASSESSMENT AND COLLECTION OF TAXES*Dear Sir:*

In reply to your memorandum of the 11th, requesting my opinion as to the probability of the constitutionality of a local bill compelling the county tax assessor to make a horizontal increase in present assessed valuation, I would state that Section 20 of Article III of the Constitution provides in part as follows:

"The Legislature shall not pass special or local laws in any of the following enumerated cases: * * * for assessment and collection of taxes for State and county purposes."

It is therefore my opinion that, in view of this constitutional provision, a local law as you suggested would not be constitutional.

April 19, 1939—O-158.

MOTOR BOATS NOT EXEMPT FROM TAXES UNDER SECTION
13 OF ARTICLE IX OF THE CONSTITUTION*Dear Sir:*

I am in receipt of your letter of the 18th, enclosing copy of a letter from Honorable W. S. Sparkman, Tax Assessor of Hillsborough County, and requesting my opinion as to whether or not motor boats are exempt from personal property taxation under Section 13 of Article IX of the Constitution.

Section 13 of Article IX of the Constitution provides as follows:

"Motor vehicles, as property, shall be subject to only one form of taxation which shall be a license tax for the operation of such motor vehicles, which license tax shall be in such amount and levied for such purpose as the Legislature may, by law, provide, and shall be in lieu of all ad valorem taxes assessable against motor vehicles as personal property."

Webster defines "vehicle" as: "Any kind of carriage *moving on land*, either on wheels or runners, comprehending coaches, chariots, buggies, wagons, carts of every kind, sleighs, sleds, and the like."

In the case of *Duckwell v. City of New Albany*, 25 Ind. 283, it was held:

"As used in Act for the incorporation of cities (Section 42), empowering the common council to levy and collect in each year a specific tax on any carriages and vehicles used and run for passengers for hire, 'vehicles' does not include a ferryboat."

TAXATION — Miscellaneous

Under the Motor Vehicle License and Registration Act, the term "motor vehicle" is defined as: "including motor vehicles, automobiles, motor trucks and all other vehicles operated over the *public streets and highways* of this State * * *."

The history of the adoption of Section 13 of Article IX of the Constitution indicates that the people of this State meant only to exempt motor vehicles operating on land from the personal property tax, because it was passed to prevent the Legislature from providing, as it did in Chapter 14574, Laws of Florida, 1929, that license tags for automobiles could not be issued until personal property taxes on the automobiles had been paid, the people apparently feeling that the amount paid for license tags was a sufficient amount of taxes to be levied on automobiles by the State.

Our Supreme Court, in the case of *City of Jacksonville, et al., v. Continental Can Company*, 151 So. 488, held:

"Fundamental purpose in construing State constitutional provision is to ascertain and give effect to intent of framers and people who adopted it.

"Construction of State constitutional provision should not be technical nor liberal, but aim should be to give effect to purpose indicated by fair interpretation of language, and natural signification of words used in order and grammatical arrangement in which they have been placed.

"Words of State Constitution must be interpreted in their most usual and obvious meaning, unless text suggests that they have been used in technical sense.

"Presumption is in favor of natural and popular meaning in which words are usually understood by people who adopted them in State Constitution."

With these rules of construction in mind and the fact that the word "vehicle" is defined to mean only a conveyance that moves on land, and in view of the history of the adoption of Section 13 of Article IX of the Constitution, it is my opinion that motor boats are not exempt from personal property taxes under this provision of the Constitution.

August 16, 1939—O-535.

CAPITAL STOCK TAX—REFUND—CONSTRUCTION OF
CHAPTER 19160

Dear Sir:

This will acknowledge receipt of your letter of August 15 * * * and copy of Chapter 19160, Acts of 1939. Said Act provides for the refunding to the Palm Beach Mercantile Company the sum of \$500.00 of overpayment of capital stock tax. It also provides that the Secretary of State shall draw a warrant for said sum payable to said company and directs the State Treasurer to pay such warrant out of any money in the State Treasury.

TAXATION — Miscellaneous

You ask me to advise you whether or not you have the authority under this Act to draw this warrant.

In reply I wish to advise that the Supreme Court of Florida in the case of *Haworth v. Chapman, etc.*, 152 So. 663, has laid down a rule for statutory construction that I believe should be followed in this instance. The Court said in that case:

"When legislative intention can be ascertained with reasonable certainty, words may be altered or supplied in statute so as to give it effect and avoid repugnancy or inconsistency with intention."

It clearly appears to me from the Act that it was the intention of the Legislature to refund from the State Treasury to the Palm Beach Mercantile Company taxes over-paid by it to the State of Florida.

Under the above quoted rule, when such intention can be ascertained words may be altered to carry the Act into effect. Therefore, I think that the words "Secretary of State of the State of Florida" appearing in Section 1, the first sentence thereof, should be altered to read "The Comptroller of the State of Florida be and he is hereby authorized and directed to draw a warrant in the sum of \$500.00," etc.

My opinion above, of course, answers your question in the affirmative.

November 4, 1939—O-640.

TAXABILITY OF EXHIBITIONS ON RAILROAD CARS

Dear Sir:

In reply to your letter of the 4th instant enclosing a letter from the Mammoth Exposition Train, and requesting my opinion as to the provision of the law under which this exhibition shall be licensed, I would state that if this exhibition is operated in accordance with the conditions stated in their letter, that in view of the decision of our Supreme Court in the case of *Perkins v. Stoutamire*, reported in 146 So. 197, I do not think that Chapters 17758 and 17760, Laws of Florida, 1927, would apply to this exhibition due to the fact that the exhibition is not exhibited to the public in a tent or other temporary structure. In my opinion, this exhibition should be licensed under Section 20 of Chapter 18011, Laws of Florida, 1937.

December 21, 1939—O-681.

**FUEL TAX NOT REQUIRED OF COUNTIES, MUNICIPALITIES
AND STATE GOVERNMENTAL AGENCIES**

Dear Sir:

I am in receipt of your letter of the 20th in which you inquire as follows:

"Please give me your opinion as to whether or not the Comptroller has

TAXATION — Miscellaneous

authority under the provisions of Chapter 19446, Acts of the 1939 Legislature, to require all cities, counties and other State governmental agencies to pay the tax provided for in this chapter."

In reply, would state that Chapter 19446 imposes a tax on the use of distillate in any internal combustion engine for the generation of power to propel motor vehicles on the public highways of the State of Florida.

Paragraph D of Section 1 is as follows:

"(d) 'Person' shall mean and include any individual, association, firm, co-partnership, corporation, receiver, trustee, conservator or other officer appointed by any State or Federal court."

It is my opinion that counties, municipalities, or any State governmental agencies are not included within the definition of "person" made by this Act, and, therefore, they are not liable for the tax on the fuel used by them which is covered by this Act.

This opinion is not in conflict with the case of *Orange State Oil Co. v. Amos*, 137 So. 707, wherein the Supreme Court of Florida held that a municipality was liable for the gasoline tax. The opinion in that case pointed out that the tax on the sale of gasoline is an excise tax on the privilege of selling gasoline exacted from the dealer unless paid by predecessor, while the tax required by Chapter 19446 is a tax on the use of the fuel and is required to be paid by the user rather than the dealer.

June 18, 1940—O-827.

AUTHORITY OF SEABOARD AIR LINE RAILWAY TO SET OFF
AN ALLEGED OVER-PAYMENT OF PERSONAL PROP-
ERTY TAXES AGAINST REAL PROPERTY
TAXES ON PROPERTY LEASED
BY IT

Dear Sir:

I am in receipt of your letter of the fourteenth in which you state that under Section 960, C. G. L., 1927, the Seaboard Air Line has been making a return of all personal property owned by it operated on all its lines and on its leased lines, that the Naples, Seaboard and Gulf Railroad Company, operating in Collier County, has for the years 1935-1938, inclusive, been making a return to the Comptroller listing only track, roadbed and real estate property and not returning any personal property for taxation, that according to the statutes you have fixed the value of the personal property returned by the Seaboard and allocated it on the basis of mileage to the various counties over which the rolling stock operates. This allocation has been made not only on the lines owned by the Seaboard Air Line but also on the lines leased by it.

You further state that prior to the decision in which the assessment on railroad property was cut to 24% that the Seaboard Air Line paid a portion

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of the tax levied against this rolling stock and personal property distributed by the Comptroller to Collier County; that this payment was made specifically for the tax on rolling stock and personal property alone, the amount of this tax being \$917.87; that the S. A. L. now claims that under the decision cutting the assessment that it should only have paid \$765.53 and that the Comptroller and/or the Board of County Commissioners of Collier County should allow a set-off of the difference between this amount and the \$917.87 on the taxes assessed against the roadbed of the Naples, Seaboard & Gulf Railroad Company. You further state that the taxes on the rolling stock have been paid without protest, and without raising any question as to an improper entry on the tax rolls. You ask the following:

1. Is this levy a tax levied against two separate corporations, (a) the Seaboard Air Line Railway for *rolling stock* used in Collier County and (b) against the Naples, Seaboard & Gulf for *real property*; or is the entire assessment a levy only against the Naples, Seaboard & Gulf since the rolling stock is allocated to that county based on the mileage of the latter road over which it operates?

2. If the former is true and there are two separate levies against two separate corporations and the Seaboard Air Line Railway, in paying its rolling stock and A. S. taxes, paid more than it should have, in view of a subsequent decision by the courts—which reduced the assessment ratio from 33-1/3% to 24%—can the county rebate to the Seaboard Air Line Railway the amount of that overpayment?

In answer to the first question, it appears to me that it is unnecessary to determine whether or not the above constitutes a tax assessment against two separate corporations since the personal property was returned by the Seaboard Air Line as its own property and a proportionate part thereof was merely allocated to Collier County for the purposes of taxing that part of the rolling stock owned and operated by the Seaboard Air Line in Collier County.

In answer to the second question I would state that since there were two separate returns by two separate corporations and the Seaboard paid its personal property tax without protest that it cannot now claim the benefit of a reduction in the assessment ratio which was made in a suit determined after the taxes were paid and that the county cannot now rebate to the Seaboard Air Line Railway the difference in the amount which would be due had it waited until after the decision reducing the assessed value of the property by allowing the Naples, Seaboard & Gulf Railroad a credit of the amount of the difference. See *St. Lucie Estates, Inc., et al., v. Ashley, et al.*, 141 So. 738:

"In its pragmatic application a tax is not a debt in the ordinary sense of that term, it is not predicated on contract, and can, under no circumstances, be discharged by setoff, counterclaim, or barter, and when legally assessed taxing officers are totally without power to compromise or release it except as specifically authorized by statute, and, when such power is given, it must be rigidly pursued."

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July 27, 1940—O-879.

GAS TAX—DISTRIBUTION WHERE FIRST, SECOND AND THIRD
PREFERENTIAL ROADS COMPLETED AND ORIGINAL
CONTRIBUTION REPAID*Dear Sir:*

This is in reply to your letter of July 23, in which you ask if the funds accruing to Dade County after the completion of all of its first, second and third preferential roads, and the repayment to it of the amount originally contributed by Dade County, in the construction of State roads, should be paid into the State Road License Fund, to be used by the State Road Department, as provided by law.

From a thorough consideration of the whole of Chapter 15659, Acts of 1931, and particularly Sections 8 (b) and 8 (c) thereof, I am of the opinion that the intention of the Legislature was to provide a long-range plan for the distribution of the second gas tax, which plan contains the three stages following:

(1) Repayment of the amount originally contributed by each county, by crediting this amount to the county for disbursement by the Board of Administration for the benefit of the county;

(2) Construction by the State Road Department of the first, second and third preferential roads in each county, entirely, or to the extent attainable by the use of an equal amount of money to the amount originally contributed by each county.

(3) Upon fulfillment of the conditions enumerated in (1) and (2), use of all funds thereafter accruing, to construct State roads throughout the State generally.

I am, therefore, of the opinion that the funds on hand or accruing to Dade County, after the completion of its preferential roads and the repayment of its original contribution to the State road system, should be placed in the State Road License fund.

August 7, 1940—O-889.

LIABILITY OF CONSTITUTIONALLY EXEMPT HOMESTEAD
AND PERSONALTY FOR BEVERAGE TAX*Dear Sir:*

In your letter of July 30, you stated that your department recently raided a still in Dade County which was being operated by one Ferguson, and found ninety-five gallons (95 gals.) of non-tax-paid whisky and three thousand five hundred gallons (3,500 gals.) of non-tax-paid mash at such still. You state further that demand was made on Ferguson for payment of the tax but he

TAXATION — Miscellaneous

refused to comply; that a tax warrant was issued, directed to the sheriff, who, in serving the warrant, seized an automobile which was the only property of Ferguson's that could be located. Ferguson has filed claim for exemption as provided in Section 1, Article X, Constitution of Florida, wherein the homestead and one thousand dollars worth of personal property are "exempt from forced sale under process of any court."

You request my opinion as to whether this section of our State Constitution may be used in this manner to evade the payment of the State tax on illegal alcoholic beverages.

It is my opinion that Section 1 of Article X of the Constitution of Florida was never intended to be used as a cloak for such reprehensible activities. Section 1 of Article X was intended primarily to secure to the citizens of this State relief from private debts in the amount of a homestead and \$1,000 personal property. However, the framers of our Constitution very clearly recognized the paramount necessity of protecting the right of the sovereign to collect taxes due it and inserted in the above mentioned Section 1 of Article X this language:

*"But no property shall be exempt from sale for taxes or assessment. * * *."*

It is very clear that a homestead or personal property to the value of \$1,000 is liable for taxes assessed or levied directly upon the homestead or the personalty. *Lewton v. Hower*, 18 Fla. 872; *Milton v. Milton*, 63 Fla. 533, 58 So. 718. Sec. 895, C. G. L., 1927; Chapter 10040, Acts of 1925, Sec. 1.

The law is pretty well settled that a homestead or other exempted property is liable for all types of taxes where there is a general exception clause for taxes in the constitutional or statutory exemption provisions. *Lamar v. Sheppard*, 80 Ga. 25, 5 S. E. 247; *Geitz v. Webster (Ariz.)*, 50 Pac. (2d) 573. In 20 C. J. 871, in regards to taxes, the following is found:

"Where the exception is general, it usually applies to all taxes whether assessed against the homestead or other property of the debtor."

Geitz v. Webster (Ariz.), 50 Pac. (2d) 573, is a late Arizona case, similar in many respects to the case here under consideration. In that case, Webster owned a homestead on which the taxes were delinquent; he also owned personalty with delinquent taxes. Webster died and his widow sought to have the taxes segregated, offering to pay the taxes assessed against the realty but refusing to pay the personalty taxes. The Court, in refusing to foster such action, stated:

"We think the exemption from liens and forced sales given by Section 1733, *supra*, applies only to private debts and liens, and not to those arising from the taxing power of the State."

There is nothing in Section 1 of Article X that would prohibit the Legislature from making any and all taxes due the sovereign a lien on the homestead or the exempted personalty. On the contrary, this section specifically

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provides: "But no property shall be exempt from sale for taxes or assessments * * *."

The Legislature of the State of Florida in enacting the "Beverage Act" and other sections of our statutes relative to excise taxes and liens for such taxes is presumed to have done so with complete knowledge of the contents of Section 1 of Article X of our Constitution.

That the Legislature intended that such taxes were to be collectible out of any property of the person responsible for the payment of the tax seems clear. The terms of the Beverage Act provide that: "Any person, firm or corporation who shall own or have in his or her possession any unstamped beverage as aforesaid, *shall*, in addition to the fines and penalties otherwise provided in the Beverage Act, *be personally liable* for the amount of the Florida excise liquor stamp tax required to be paid on such beverage; and the Director is hereby empowered to collect such tax from such person, firm or corporation by suit or otherwise" (Chapter 19301, Acts of 1939, Sec. 5 [a]), thus evidencing an intention to provide for the very contingency that has arisen in the instant case. But going further, the Legislature in the very same Act has made provision that:

"Any excise tax imposed in either of the two preceding paragraphs *may be collected as any other excise tax* imposed by the State of Florida, and all rights and remedies available in the collection of any excise tax imposed by the State of Florida are hereby made available for the collection of the taxes imposed under the Beverage Act." (Chapter 19301, Acts of 1939, Section 5 [c]).

In enacting Section 5 (c) of Chapter 19301, Acts of 1939, the Legislature did so with full knowledge of prior existing Acts for collection of such taxes and liens created in aid of such collections.

Section 32 of Chapter 18011, Acts of 1937, provides:

"Whenever any person who is subject to the payment of a license or privilege tax provided by this or any other law of the State of Florida, shall fail to pay the same when due, the tax collector, Comptroller, State Treasurer, or other official to whom the said tax is payable, *is hereby authorized and empowered to issue a warrant directed to all and singular the sheriffs of the State of Florida, commanding them and each of them to levy upon and sell any real or personal property of the person liable for said tax* within his respective jurisdiction for the amount thereof and the cost of executing the warrant, and to return such warrant to the officer issuing same, and to pay to him the money collected by virtue thereof within sixty days from the date of the warrant."

The Legislature, with full knowledge of Section 1 of Article X of the Constitution, has seen fit to direct the collection of license or privilege taxes out of "any real or personal property of the person liable for said tax." Therefore, in view of what has been previously stated relative to the general

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exemption provision for taxes contained in Section 1 of Article X of the Constitution, it is my opinion that the homestead or personal property exemption of the aforementioned Constitutional provision is no bar to the State in the collection of this tax admittedly due it.

December 30, 1940—O-1926.

WHETHER OR NOT PERSONS IN MILITARY SERVICE ARE
ENTITLED TO HOMESTEAD EXEMPTION ON PROP-
ERTY WHICH IS USED FOR COMMERCIAL
PURPOSES

Dear Sir:

I am in receipt of your letter of the 27th instant, in which you ask for my opinion as to whether or not a person who has volunteered or has been taken in the military service by reason of the draft, or otherwise, would be entitled to claim the exemption from taxation, as provided by Section 7, Article X, of the Constitution of Florida, on his homestead when he or any other person legally or naturally dependent upon him does not reside thereon and when said property is being rented or used otherwise commercially.

In reply to this question I would state that Section 7 of Article X of the Constitution of this State, as amended, provides in part as follows:

"Every person who has the legal title or beneficial title in equity to real property in this State *and who resides thereon* and in good faith makes the same his or her permanent home, or the permanent home of *another or others legally or naturally dependent upon said person*, shall be entitled to an exemption from taxation, except for assessments for special benefits up to the assessed valuation of five thousand dollars on the said home and contiguous property * * *."

The provisions of the above quoted section of the Constitution that I have italicized with reference to residing upon the property can be met provided the person in military service does not rent the same or otherwise use the property commercially, as I am of the opinion that a mere temporary absence while in the military service of the United States would not have the effect of interrupting the residence of the owner of the homestead, provided he intends to return to such property after he has been released from military service and to again occupy said property as his home.

However, as I have pointed out, should such person rent his homestead or otherwise use it commercially during the period of time that he is absent therefrom and in the military service of the United States, he would not be entitled to the homestead exemption under Section 7 of Article X of the Constitution of Florida as amended.

TAXATION — Miscellaneous

September 4, 1940—O-915.

**COUNTY ROADS—LEVY OF THREE MILLS FOR PURCHASING
RIGHTS OF WAY**

Dear Sir:

I have received your letter asking whether a levy of three mills could be made separately for the purpose of purchasing rights of way for county roads so long as the total levy for the road and bridge fund does not exceed ten mills, as set by Chapter 19634, Acts of 1939, Laws of Florida.

A similar situation was considered in 1919 by our Supreme Court in the case of Dade County v. City of Miami, 77 Fla. 786, 82 So. 354, wherein it was held that the tax levy Act of 1913 which authorized the levy of a tax not exceeding eight mills did not repeal Section 9 of Chapter 6537, Acts of 1913 (Section 2453 C. G. L.), but simply modified it to the extent of authorizing a levy of a tax not exceeding eight mills rather than a levy of a tax of not exceeding five mills.

It is therefore my opinion that Chapter 19634, Acts of 1939, Laws of Florida, which provides for a levy of a tax not exceeding ten mills does not repeal the provisions of Section 1604, R. G. S. (Section 2453 C. G. L.), but simply modifies previous law to the extent that the authorized levy is raised from not exceeding five mills to not exceeding ten mills and that the proviso in regard to cities and towns is still in force.

September 5, 1940—O-920.

**DISPOSITION OF SURPLUS ARISING FROM SALE OF
LANDS FOR TAXES**

Dear Sir:

I am in receipt of your letter of the fourth instant, requesting my advice with respect to the disposition of any surplus arising from the sale of lands under tax deed procedure as authorized by Chapter 7457, Acts of 1935. I have also considered the opinion of the Supreme Court in the case of State ex rel. Groves v. Caruthers, filed February 16, 1940.

In the Caruthers case the Court held that in issuing a tax deed under Chapter 17457, the lien represented by the tax sale certificate attaches to the surplus over the amount paid for the certificate with costs and expenses, and that such surplus should be applied pro rata to the tax and assessment liens covered by the tax sale certificates which became merged in the tax deed. The taxes represented by the certificate bore interest, and until all such taxes and interest represented by the certificate on which the tax deed issues are paid, there is no surplus to be paid to the former owner of the land.

TAXATION — Miscellaneous

November 5, 1940—O-976.

DISTRIBUTION OF GASOLINE TAXES WHERE ORIGINAL CONTRIBUTION REPAID AND PREFERENTIAL ROADS COMPLETED—DADE COUNTY*Dear Sir:*

From your letter of November 4, 1940, the following facts appear: On August 25, 1939, Dade County had been fully repaid the amount of its original contribution to the State road system in accordance with the provisions of Chapter 15659, Laws of Florida, Acts of 1931. On August 25, 1939, the first, second and third preferential roads in Dade County had not been completed, but the funds thereafter apportioned monthly to Dade County from the second gas tax were used by the State Road Department to complete those preferential roads, and on July 27, 1940, the chairman of the State Road Department filed in your office a certificate to the effect that such roads had been completed. At the time of the filing of the certificate, the unexpended accruals to the credit of Dade County amounted to \$954,155.32. Subsequent accruals to the credit of Dade County raised this balance to \$1,084,506.89, the amount on hand at the present time.

You asked to be advised as to whether or not the present balance on hand should be transferred to the State Road License Fund for use by the State Road Department in constructing State roads as the State Road Department may determine.

From a careful study of Chapter 15659, Laws of Florida, Acts of 1931, and particularly Sections 8 (b) and 8 (c) thereof, I am of the opinion that these funds should be transferred to the State Road License Fund and may be used by the State Road Department in the manner provided by law for construction of State roads throughout the State generally. In my opinion, after a county has been repaid the amount of its original contribution, and after the first, second and third preferential roads established at the date of the passage of Chapter 15659 have been completed in such county, funds thereafter accruing should be placed in the State Road License Fund to be used by the Road Department for State road construction anywhere in the State, even though the county has not received in full the "equal amount" referred to in the aforementioned statute.

CHAPTER XI

MISCELLANEOUS

September 12, 1939—O-522-1.

AIR LINE TRANSPORTATION—DEPOSITS TO SECURE DISCOUNT AUTHORIZED TO BE PAID FROM EXPENSE COLLECTION OF REVENUE

Dear Sir:

I am in receipt of your letter of the 9th, in which you state that officers and employees of the State of Florida have used airplanes as a mode of transportation on official business of the State and have spent for such transportation the aggregate amount of \$6 681.00. You state further that the airplane companies would give the State a 15 per cent discount on all transportation tickets if the sum of \$425.00 were deposited with the companies. You request my opinion as to whether or not you would have authority to draw a warrant against the fund known as the Expense of Collecting Revenue and deposit it with the airplane companies in order that the State may receive the 15 per cent discount.

It is my opinion that since most of this expense will be incurred for collecting revenue that you are legally authorized to draw a warrant against the Expense of Collecting Revenue Fund in the sum of \$425.00 and deposit it with the airplane companies. Of course this amount is to be returned at any time you desire.

February 7, 1939—O-40.

BOUNDARIES—ALACHUA COUNTY BOUNDARY LINE AT ORANGE LAKE

Dear Sir:

In reply to your request of February 3, 1939, for a ruling on the exact southern boundary of Alachua County at Orange Lake because of the change in the water level, for the purpose of determining the proper venue for a prosecution, I find that said county boundary line is described in part as follows:

"On south by the southern margin of Orange lake and the line dividing townships eleven and twelve to where the said line strikes range line dividing Ranges Seventeen and Eighteen." Section 41, Compiled General Laws, 1927, Chapter 6509, Acts 1913, Sec. 1.

Probably under the authorities hereinafter cited the line would remain at the margin of the lake when said Act was passed, or at the normal shore line; however, that feature may be immaterial if the lake is legally navigable water,

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in view of another statute which provides that when the territorial jurisdiction of a court in any county shall extend to one bank of any navigable water, such court shall have jurisdiction across such navigable water from shore to shore. Section 7122, Compiled General Laws, 1927; also Section 4223, Compiled General Laws, 1927.

Such a statute has been applied to a river boundary line. *Hackney v. State* (Texas Cr.), 74 S. W. 554.

According to the weight of authority, such a statute is valid and does not deprive an accused person of a constitutional right to a trial by an impartial jury in the county where the offense was committed. 16 C. J. 197, Sec. 295 and citations at note 77.

Whether specific waters in Florida are in law navigable depends upon the depth and extent of the waters and it has been said that a body of water may be navigable in law if it is suited to navigation, although not actually used therefor. *Broward v. Mabry*, 48 Fla. 398, 50 So. 826; *Martin v. Busch*, 93 Fla. 535, 112 So. 274. See also *Deering v. Martin*, 95 Fla. 224, 116 So. 54.

The Legislature has treated Orange Lake as public waters to the extent of authorizing conveyance of part of the lake bottom by the Trustees of the Internal Improvement Fund, which tends to support the conclusion that the lake was regarded as navigable. Section 1443 (7), Compiled General Laws 1927, 1936 Sup., Chapter 13669, Acts 1929, Section 1.

Since, therefore, the venue may be determined under the statutes first herein cited, if the lake is navigable under the decisions cited, I refer only briefly to other authorities upon the effect of a change in a short line named as a boundary, for further investigation if the lake is not navigable.

The ordinary rule is that the boundary remains as when established and does not change with the shifting waters. Citations in: *Shapleigh v. Mier*, 299 U. S. 468, 81 L. Ed. 355; 57 Sup. Ct. 261; 113 A. L. R. 253-254. See 11 C. J. S. 571, Sec. 27 (b).

A margin of a lake has been held to mean the line where the earth and water meet. 5 Words and Phrases, 1st Ed., 4368.

July 19, 1939—O-493.

BANKRUPTCY—ACCOUNT FLORIDA SHELL ROCK CO.

Dear Sir:

In your letter of the 18th instant, I observe the following facts:

The Florida Shell Rock Company had on deposit with Citizens Bank of Williston \$1,746.23 at the time said bank failed in 1927. Later the Florida Shell Rock Company went into bankruptcy, and its account in the Citizens Bank of Williston was not listed among its assets, and no claim was made by the Trustee in Bankruptcy in respect to the dividends paid by the liquidator of said bank. No one having claimed the first dividend paid by the bank on

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the account of Florida Shell Rock Company, the warrant therefor was cancelled.

It further appears that bankruptcy proceedings were closed out, and that the secretary and treasurer of the Florida Shell Rock Company is now calling on you to deliver to him the unpaid dividends due to the Florida Shell Rock Company on account of the said deposit in the Citizens Bank. You thereupon ask to be advised whether you are authorized to pay over to the Florida Shell Rock Company the dividends declared by the bank liquidator on account of the deposit of the Shell Rock Company in said bank.

My opinion is that you would not be authorized to pay the dividend declared on the said deposit of the Florida Shell Rock Company in the Citizens Bank of Williston, to either the corporation itself or its secretary-treasurer, without an order of the court in which the bankruptcy proceedings were had, authorizing and directing you to do so. When the Florida Shell Rock Company was adjudged bankrupt and a trustee appointed therefor, the title to all the assets of the corporation, including its account in the Citizens Bank of Williston, vested in the trustee for the benefit of the creditors of the Florida Shell Rock Company, and until all the debts of the Florida Shell Rock Company are paid, neither the corporation nor its officers are entitled in law to a return of the corporation's assets, which include the said bank account.

If the secretary-treasurer of the Florida Shell Rock Company can procure an order from the Court in which the bankruptcy proceedings were had, authorizing and directing you to pay said dividends over to the Florida Shell Rock Corporation or its secretary-treasurer, you would be protected in law in complying with such order.

April 18, 1940—O-789.

BONDS—COMPTROLLER NOT AUTHORIZED TO SETTLE JUDGMENTS ON ESTREATED BONDS

Dear Sir:

This will acknowledge receipt of your letter of today enclosing copy of letter from the Clerk of the Circuit Court at DeLand, Florida, with reference to the compromise and satisfaction of judgment in the amount of \$500.00 against W. M. Cowan. You request my opinion as to whether the Comptroller should approve or disapprove of compromise of this judgment and also as to who would have authority to issue the satisfaction in compromise of same.

The only statute that I can find that touches this question is Section 4752 of the Compiled General Laws, 1927. The preceding sections relate to the duties of the State Attorney and the section I have referred to authorizes the State Attorney " * * * with the approval of the Comptroller, to compromise and settle all judgments, claims and demands in favor of the State in his circuit against defaulting collectors of revenue, sheriffs and other officers, and

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the sureties on their bonds, on such terms as he may deem equitable and proper."

You will note that it does not authorize the compromise of judgments generally but limits settlements to judgments and claims against defaulting collectors of revenue, et cetera.

I note in Mr. Hawkins' letter that the judgment in question "arose by virtue of the estreature of an appearance bond a number of years ago."

Since the Legislature did not include judgments such as the one you mention, I am of the opinion that there is no authority to compromise or settle the same.

November 6, 1940—O-980.

**BUILDING AND LOAN ASSOCIATIONS—CANCELLATION OF
DIVIDEND CHECKS TWO YEARS OLD OR MORE**

Dear Sir:

In your letter of the 5th instant you ask to be advised whether dividend checks issued by Dade County Security Company, a building and loan association, which was placed in liquidation in 1927, which checks are two years old or more and are uncalled for, may be cancelled under the provisions of Chapter 15877, Laws of Florida, Acts of 1933, and the funds derived from such cancellation used to augment the dividends of those creditors who are claiming their checks.

Chapter 15605, Laws of Florida, Acts of 1931, provided for the appointment of a liquidator for building and loan associations, as did Section 6181 of the Compiled General Laws of Florida provide for the appointment of a receiver for building and loan associations, and both statutes then provided that upon the appointment of such liquidator or receiver, "the Comptroller shall proceed in the manner provided by the laws of the State of Florida for the winding up and liquidation of banks, and all the provisions of the laws of the State of Florida applying to the winding up and liquidation of banks shall apply to building and loan associations wherever the same shall be applicable."
* * *

The disposition of the assets of a building and loan association is a part of its liquidation and the provision for cancellation of uncalled for dividend checks in the statute relating to the liquidation of banks is applicable in the case of uncalled for dividend checks of a building and loan association.

Section 6181 of the Compiled General Laws and Chapter 15605, Acts of 1931, were repealed by Section 12 of Chapter 15909, Acts of 1933, but it was provided by Section 12-A of Chapter 15909 that the provisions of that Act should not apply to building and loan associations that were then in the hands of the Comptroller or a liquidator or receiver appointed by the Comptroller or any circuit court. That means, as I construe Section 12-A, that the re-

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pealing provision of Section 12 would not apply in the case of building and loan associations that were then in liquidation.

It follows, therefore, that as to building and loan associations in liquidation prior to and at the time of the effective date of Chapter 15909, Acts of 1933, the provisions of law relating to the winding up and liquidation of banks, including the provision for the cancellation of dividend checks, would continue to be applicable until the liquidation of such building and loan association is completed.

September 24, 1940—O-936.

CENSUS—EFFECTIVE DATE

Dear Sir:

In reply to your letter of the 23rd in which you state as follows: "Quite a large number of population Acts will become applicable in counties which they have not previously affected and will cease to affect certain counties to which they have formerly applied with the effective date of the 1940 census. So as to insure uniform treatment throughout the State, will you please advise what date should be used in applying the 1940 census?"—I would state that in my opinion the 1st of April, 1940, should be used in applying the 1940 Federal census.

This identical question was discussed by the Supreme Court of Tennessee in the case of Underwood, et al., v. Hickman, Judge, et al., reported in 39 S. W. (2nd) 1034, and in this case that Court said:

"By Section 6 (13 U. S. C. A., Sec. 206) it is provided that the census of the population shall be taken as of the 1st day of April, and it is made the duty of each enumerator to commence the enumeration of his district on the day following, unless the Director of the Census in his discretion shall change the date of commencement of the enumeration in said district by reason of climatic or other conditions which would materially interfere with the proper conduct of the work; but, in any event, it shall be the duty of each enumerator to prepare the returns and forward same to the supervisor of his district within thirty days from the commencement of the enumeration.

"By Section 13 (13 U. S. C. A., Sec. 213) the Director of the Census is authorized to have printed by the Public Printer, in such editions as he may deem necessary, preliminary and other census bulletins, and final reports of the results of the several investigations authorized by this statute, and to publish and distribute said bulletins and reports.

By Section 18 (13 U. S. C. A., Sec. 218) the Director of the Census is authorized at his discretion, upon the written request of the Governor of any State or territory or a court of record, to furnish such Governor or court of record with certified copies of so much of the population reports as may be requested, upon the payment of the actual cost of making such copies and \$1 additional for certification.

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"(1) From the foregoing, it will be observed that the census shall be taken as of April 1, that the Director is given three years to complete his report, but is authorized to make preliminary reports from time to time. No specific provision is made for publishing official reports, and the statute does not fix a definite date when the new census becomes effective. The only logical conclusion is that it becomes effective on April 1, and such, in our opinion, was the intention of Congress. Should we adopt any other date, it would result in irregularity and nonuniformity. For example, two counties could be raised by the same census to another class; the population of one might be officially determined on July 1 and the other on October 1, so that in the one county the clerk would begin drawing the increased salary three months before the clerk in the other county would be entitled to the additional compensation. Theoretically, at least, they are entitled to the same compensation, and to construe the law as contended by complainants would result in inequality and injustice."

The cases of *People v. Wong Wang*, 28 Pac. 270, *Worcester National Bank v. Cheney*, 94 Ill. 432, *State v. Braskamp, et al.*, 54 N. W. 532, are also direct authority for my conclusion in this opinion.

May 15, 1939—O-269.

CONSTITUTIONAL AMENDMENTS—THREE-FIFTHS VOTE OF BOTH HOUSES REQUIRED

Dear Sir:

In your letter of this date you ask my opinion on the following:

"A House joint resolution, proposing an amendment to the Constitution, passes the House by the required three-fifths vote of all members of the House. It goes to the Senate where it is amended, and then passes the Senate by the required three-fifths vote of the members of the Senate."

You thereupon ask:

"Upon coming back to the House does this measure require (a) a simple concurrence by the House on the Senate amendment; (b) a concurrence by three-fifths of the members of the House; or (c) a re-reading and re-passage by three-fifths of the members of the House."

Section I of Article XVII requires proposed amendments to the Constitution to be agreed to by three-fifths of all the members elected to each House. This requirement is mandatory, and in my opinion applicable to a proposed amendment in its final form, as well as in the form in which it was originally proposed. In other words, as was said by our Supreme Court in *Crawford v. Gilchrist*, 64 Fla. 41, 50 So. 933:

"These requirements clearly contemplate that such amendments shall be agreed to by the deliberate, final, affirmative vote of the requisite number of the members of each House of the Legislature duly taken at a regular session."

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If one branch of the Legislature proposes an amendment to the Constitution, and it is agreed to by three-fifths of the members elected to that branch, and then goes to the other branch and is there amended and agreed to by three-fifths of the members elected to that branch, it must, before being properly proposed, come back to the branch in which it originated, and there be agreed to as amended by three-fifths of the members elected to that branch.

There is nowhere in the Constitution any requirement that proposed amendments to the Constitution be read as required in the case of bills.

In *Collier v. Gray*, 116 Fla. 845, 157 So. 40, it was said:

"Proposed amendments to the Constitution are required to be agreed to by three-fifths of all the members elected to each House. When that is accomplished, the proposed amendment is said to be submitted. When adopted by either House, it becomes the proposal of that House to amend the Constitution, and, when adopted by the requisite vote of each House, it becomes the proposition of three-fifths of all the members or more of each House. Such proposals are not the exercise of an ordinary legislative function, nor are they subject to the constitutional provisions regulating the introduction and passage of ordinary legislative enactments, although they may be proposed in the form of an ordinary legislative bill or in the form of a joint resolution."

May 23, 1939—O-296.

CONTRACTOR UNDER CHAPTER 18011

Dear Sir:

I am in receipt of your letter of the 22nd, asking my opinion as to whether or not a person who contracts to do a job on a cost plus basis is a contractor within the meaning of Section 11 of Chapter 18011, Acts of 1937.

In reply thereto I would state that in my opinion a person who contracts to do any work for another upon a cost plus basis is a contractor within the meaning of the above mentioned statute. In this connection see *Halstead v. Stahl*, 94 N. E. 1056; also *Knowlton v. Givens*, 178 N. W. 63, where the following is stated:

"One who furnished materials and labor for the construction of a building under a contract whereby he was to be paid the cost of such material and labor plus a percentage for his services is a contractor, entitled to a mechanic's lien for materials and labor furnished, not an agent of the owners."

I agree with you that Section 7435, Compiled General Laws, 1927, does contain a more effective way of enforcing the license laws. However, I believe that you could enforce the same either under this statute or under Section 32 of Chapter 18011, or both, the former being a criminal statute and the latter a civil one.

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February 7, 1939—O-57.

CONVICT NOT ENTITLED TO CREDIT FROM PRISON
SENTENCE FOR JAIL TIME*Dear Sir:*

Referring to letter from the Secretary to the Board of Pardons, dated January 31, 1939, and attached file, it is my opinion that a convict is not entitled, under the law, to credit on a sentence to the penitentiary for time spent in jail pending an appeal by him from the judgment upon the sentence, unless the sentence provides for such credit either expressly, or by necessary implication. *Dimmick v. Tompkins*, 194 U. S. 540, 24 Sup. Ct. 780, 48 L. Ed. 1110; 16 C. J. 1372, Sec. 3230 and cases cited. Cf. generally, *Terrell v. Williams*, 55 Fla. 596; *State v. Horne*, 52 Fla. 125; *Miller v. State*, 15 Fla. 575. Therefore, the provisions of the sentence should be examined.

In the absence of a provision in the sentence for a credit of time spent in jail, it appears that notice and application by the convict in the usual manner for commutation of punishment would be the proper procedure.

Whether the board should give consideration to the time spent in jail, involves a question of policy upon which it may be observed, however, that the refusal to give any consideration thereto would tend to discourage unnecessary appeals, yet, the giving of some consideration to jail time might tend to promote good conduct in prison, so that perhaps a policy between the two should be discussed, or each application be left to rest upon the particular record and facts involved.

June 30, 1939—O-441.

CONVICTS, STATE—HOURS OF LABOR—SECTION 3, CHAPTER
7833, ACTS 1919—RULES AND REGULATIONS*Dear Sir:*

This will acknowledge receipt of your letter of June 30 requesting an opinion upon certain points brought out by Mr. J. A. Creech in his letter to you of June 28.

Apparently, there has been some question as to the hours that convicts may be worked. He quotes Section 3 of Chapter 7833, Acts of 1919, as follows:

"No State convict shall be required to work more than sixty hours in any one week or more than eleven hours in any one day which time shall include time spent in going to and returning from work, and no convict shall be required to perform, during such time, any labor in excess of his ability to perform without impairment of his physical condition."

He also calls attention to Paragraph 23 on Page 47 of your Biennial

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Report which contains the rules and regulations regarding hours of labor of convicts. I quote the same:

"Convicts shall not be required to work on Sundays nor more than sixty hours a week, which shall include the time of going to and returning from their work. This rule does not refer to cooks and yardmen. Cooks and yardmen, however, should have one Sunday on and one Sunday off, alternately."

The statute and the rules seem to be clear and I hardly see how any one could misinterpret the same. The statute provides:

1. No State convict shall be required to work more than sixty hours in any one week.
2. No more than eleven hours in any one day, which time shall include time spent in going to and returning from work.
3. No convict shall be required to labor in excess of his ability or to perform to an extent that would impair his health.

The rules have one other condition which is:

4. No convict shall be required to work on Sundays except cooks and yardmen, who should have one Sunday on and one Sunday off respectively.

The authorities in charge of convict camps should regulate their hours of work so as to come within the statute and regulations and this should be comparatively easy to compute. I believe that the hour and a half for dinner and fifteen minutes for rest period that you spoke of, should not be included in determining whether or not a convict has worked eleven hours in any one day or sixty hours in any one week. I do not see how I could add anything further that would be helpful in the matter.

July 17, 1939—O-470.

CONVICTS—AUTHORITY OF COMMISSIONER OF AGRICULTURE AND BOARD OF COMMISSIONERS OF STATE INSTITUTIONS

Dear Sir:

At your request I beg to advise that neither the Board of Commissioners of State Institutions nor the Commissioner of Agriculture has any power or authority, supervisory or otherwise, over city convicts or city prisons.

By Section 8549, Compiled General Laws of Florida, 1927, it is provided that county convicts may be kept and worked under such rules and regulations and supervision as may be prescribed by the Commissioner of Agriculture with the advice and approval of the Board of Commissioners of State Institutions, and that the Commissioner of Agriculture with the approval of the Board of Commissioners of State Institutions shall have the power to enforce

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all such rules and regulations. This may well include regulations as to uniforms to be worn by county convicts.

It is therein also made the duty of the supervisors of State convicts to inspect and supervise all county convict camps under the direction of the commissioner of agriculture, and make written reports to him.

By Section 8559, Compiled General Laws, the Board of Commissioners of State Institutions and the Commissioner of Agriculture are directed and required to plan such adequate and proper punishment for county convicts as to them shall seem wise.

July 26, 1939—O-496.

**CONVICTS—DISCHARGE FEES TO BE PAID BY COUNTY IN
WHICH CONVICTED**

Dear Sir:

In reply to your inquiry by letter of July 19, 1939, it is my opinion under Chapter 9203, Acts of 1923, embodied in Sections 6549 and 6550, Compiled General Laws of 1927, that the discharge fees to county convicts who serve part of their sentences in jail and part in employment under a hiring or letting of them by the county commissioners to another county, are to be paid by the county in which they were convicted.

The statutes do not provide for an apportionment or prorating of the discharge fees and it is noted that the money derived from the hiring of such convicts shall be paid to the county hiring them out and shall be placed to the credit of its fine and forfeiture fund.

September 20, 1939—O-572.

**CORPORATIONS—LIMITED SURETY COMPANIES UNDER
CHAPTER 19513, ACTS OF 1939—INCORPORATION
UNDER GENERAL CORPORATION LAW
OF 1925**

Dear Sir:

This is in reply to your letter of September 18.

You submit for my consideration a proposed charter for a limited surety company. This proposed charter, in addition to granting powers authorized to be exercised by limited surety companies organized under Chapter 19513, Laws of Florida, Acts of 1939, would grant other very broad powers, including even the right to engage in the mercantile business. You request my opinion as to whether you should permit this proposed charter to be filed and become effective.

Section 1 of Chapter 19513, Acts of 1939, provides in part as follows:

"Limited Surety Companies shall be incorporated, and such companies may

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be incorporated under the provisions of Chapter 10096, Laws of Florida, Acts of 1925."

If it were not for this provision, such limited surety companies could not be organized under Chapter 10096, Acts of 1925, which is known as the General Corporation Law of 1925. Section 3 of the General Corporation Law of 1925 provides expressly that corporations may not be formed under that law to conduct the business, among others, of "surety companies."

Chapter 19513 requires a limited surety company, before transacting any business as such, to obtain a certificate of authority from the State Treasurer. In order to obtain this certificate of authority, it must comply with certain specified conditions among which is the deposit of \$5,000 in securities with the State Treasurer. The Insurance Commissioner is given broad general powers with regard to the regulation of such limited surety companies. It is conceivable that the Insurance Commissioner could require a company seeking to obtain a certificate of authority to furnish information concerning the scope of its business activities. It would seem that under Section 9 of Chapter 19513, Acts of 1939, that the Insurance Commissioner would be authorized to refuse to issue a certificate of authority in the event that he obtains information that a corporation applying for such certificate intends to engage in business activities entirely inconsistent with engaging in the business of a limited surety company.

Under Section 4 of the General Corporation Law of 1925, the corporate existence of a corporation begins upon the filing of a certificate of incorporation in your office. In view of the fact that limited surety companies can legally be organized under the General Corporation Law of Florida, it is my opinion that the mere fact that the proposed charter includes other business activities would not be sufficient ground upon which you could refuse to file such proposed charter. The corporation has a right to organize by filing its certificate of incorporation with you.

A different question presents itself, however, when the corporation seeks a certificate of authority to engage in the business of a limited surety company. Whether such a company can satisfy the Insurance Commissioner that it intends to operate strictly as a limited surety company is a matter between the company and the Insurance Commissioner when application is made for a certificate of authority.

August 13, 1940—O-892.

COUNTY PRISONERS—GAIN TIME UNDER CHAPTER 19199,
ACTS OF 1939

Dear Sir:

In a recent letter you have asked whether all county prisoners, regardless of length of sentence, should have the benefit of application of gain time for good conduct allowed by Chapter 19199, Laws of Florida, Acts of 1939.

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The law prior to 1939 (Sec. 6231, R. G. S., as amended by C. 18065, Acts of 1937) had mentioned State prisoners only in allowing gain time for good conduct. In order to remedy this situation, the 1939 Act was passed to grant the same right to county prisoners. While the Act sets out that the deduction from the term of the sentence shall be "five days per month off the first and second years of the sentence," and other days off longer sentences, the interpretation of this portion of the Act depends upon the intent of the Legislature which was above stated.

It has been generally considered that a sentence to be served in a county jail must not be for more than one year, or to be served in the State prison must not be for less than one year. Our Supreme Court, however, has recently, in the case of *Hyde v. State*, 190 So. 497, affirmed a sentence of four months in the State prison, and earlier in the case of *State v. McLeod*, 135 Fla. 109, 184 So. 585, affirmed a sentence of two years in the county jail. We find, therefore, the situation in regard to sentences for county prisoners the same as State prisoners, some for more than one year and some for less.

It cannot be questioned that the law before 1939 applied to all state prisoners, since there was no limitation in the Acts referring to them. The customary sentence for State prisoners being a term of one or more years, the language used in the Acts was apt, since the gain time is necessarily from the last portion of the sentence to be served. In order to give full effect to the Act as intended by the Legislature so as to include all prisoners serving terms of less than one year, the deductions must be interpreted as prorated for the actual time served. The Act provides that in the case of escape, or attempted escape, or serious misconduct, "all the commutation which shall have accrued in favor of the prisoner up to that day shall be forfeited," and there could have been no accrued gain time "up to that day" if the interpretation is that any such time is allowed only at the end of a year sentence. This seems to be the interpretation of our Supreme Court in the case of *Finch v. Mayo*, 189 So. 27, wherein the court computed a gain time credit of 240 days for the first two years served, and 520 days during the succeeding two years, 10 months and 16 days to the time the petition for writ of habeas corpus was filed. Since gain time was properly prorated in this case for the time between the fourth and fifth years of a long sentence, it should likewise be prorated during the first year for a sentence for less than one year, there being no difference in the wording of the Act.

It is, therefore, my opinion that the county or State prisoners serving under a sentence of less than one year come within the provisions of the statute allowing gain time for good conduct, and that such gain time should be computed upon a prorata basis at the rate of five days per month for the period of the sentence.

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March 27, 1939—O-124.

FISH—CHAPTER 17932, ACTS OF 1937—CLOSED SEASON ON
BLACK BASS—APPLICABILITY TO LAKE OKEECHOBEE*Dear Sir:*

This is in reply to your letter of March 24, 1939, reading as follows:

"I will appreciate your giving me an opinion relative to the legality of closed bass season insofar as it affects Lake Okeechobee."

Section 1 of Chapter 17932, Laws of Florida, Acts of 1937, reads as follows:

"Section 1. That on and after the passage of this Act it shall be unlawful for any person, persons, firm or corporations to take from any of the fresh waters of the State of Florida any large or small mouth Black Bass (*Micropterus dolomieu* or *micropterus salomides*) during the period of each year beginning March 15th, and ending May 20th."

The Act provides for a punishment for violation thereof, and repeals all laws or parts of laws in conflict therewith.

I am advised that Lake Okeechobee is in fact fresh water. Therefore, I am of the opinion that the closed season provided for by this Act is applicable to Lake Okeechobee as well as to other fresh waters. The fact that Chapter 10123, Acts of 1925, as amended by Chapter 17012, Acts of 1935 (C. G. L. Supplement, Sec. 1875) requires that Lake Okeechobee be considered as salt water for the purposes of that Act, has no bearing upon the applicability of Chapter 17932 to Lake Okeechobee.

September 14, 1940—O-938.

FLORIDA NATIONAL GUARD—FUNDS MAY BE USED FOR
BENEFIT OF*Dear Sir:*

I have your oral request for an opinion as to whether or not you can legally approve an expenditure of \$500.00 from "Other Funds" to pay a portion of certain bills that were created during the sickness of the late Colonel Preston Ayers, such funds being money sent by the War Department many years ago that represented balances of organization funds turned in as World War units were disbanded.

The Adjutant General informs me that the sources of these funds were explained in a letter written to Governor Martin by the Adjutant General on April 25, 1928, and he also refers me to the provisions of Chapter 12102, Acts of 1927. I find that this Act provided that the Governor was "authorized to receive such funds as trustee and to distribute them for the benefit of the National Guard of this State in such manner as his judgment may dictate."

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Since the Legislature vested in you the discretion to distribute said funds for the benefit of the National Guard in such manner as you may desire, I am of the opinion that if you feel that this requested expenditure be for the benefit of the National Guard, it will be proper for you to approve the same.

August 14, 1939—O-531.

FROZEN DESSERTS LAW—SALE OF KOKANUT KREME
PROHIBITED

Dear Sir:

In your letter of the 14th instant, you state that the manufacturers of "Kokanut Kreme" have requested advice as to their status under the Frozen Desserts Law. You also state that the State Chemist advises that he has analyzed this product and finds its base to be cocoanut oil and that this substance comes within the class of fatty oil substances. You thereupon ask to be advised if the sale of this product is legal.

The answer to your inquiry is found in subparagraph (e) of Section 7, Chapter 16047, Laws of Florida, Acts of 1933, brought forward as Section 3219 (34), Permanent Supplement of the Compiled General Laws of 1927, which is:

"No person shall sell, advertise or offer or expose for sale a frozen dessert if it contains any fats, oils or paraffin other than milk fats, except such fats or oils as are naturally contained in the flavors used."

July 19, 1939—O-480.

GUARDIAN—APPOINTMENT UNDER CHAPTER 19163, LAWS
OF FLORIDA, 1939

Dear Sir:

I am in receipt of your letter of the 18th, inquiring as to whether or not the guardian required to be appointed under the provisions of Section 5 of Chapter 19163, Laws of Florida, 1939, is the same guardian provided for in Section 5913, Compiled General Laws, 1927, and also inquiring if a bond should be required of such guardian and who should pay the cost of recording such guardianship papers.

It is my opinion that the guardian required to be appointed by Section 5 of Chapter 19163, Laws of Florida, 1939, is the same guardian provided for under Section 5913, Compiled General Laws, 1927. It is also my opinion that a guardian must be appointed for every person committed as provided by Section 5 of the 1939 Act; however, I do not believe that there is any necessity for giving a bond unless the person adjudged insane is not insolvent or has an estate which the guardian should manage and account for.

I am of the further opinion that the cost of recording the guardianship

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papers and of the payment of the bond should be paid out of the estate of lunatic, provided he or she is possessed of an estate, but if there is no estate or the lunatic is insolvent, then the county, under the provisions of Section 3658, Compiled General Laws, 1927, should pay the costs of recording the guardianship papers.

August 5, 1940—O-887.

GUARDIANS—DEPOSIT OF FUNDS BELONGING TO MINORS
IN SAVINGS BANK NOT UNLAWFUL

Dear Sir:

Under Section 107, Revised General Statutes (Section 131, Compiled General Laws), you request my opinion as to whether the criminal laws of Florida are violated by a guardian in depositing cash belonging to three minors in the savings account of a bank. You state that complaint has been made to you that such investment is contrary to, and not authorized by, Chapter 17949, Laws of Florida, Acts of 1937, and Chapter 19109, Laws of Florida, Acts of 1939.

I have considered the statutes above referred to and do not find any provision in them defining any crime punishable under the laws of Florida.

December 28, 1939—O-678.

HEALTH CERTIFICATES—ONLY LICENSED PHYSICIAN MAY
ISSUE TO HOTEL EMPLOYEES

Dear Sir:

This will acknowledge receipt of your letter of December 27 requesting me to advise you whether or not a doctor can refuse to approve reports of medical examinations when examination has been made by some doctor other than an M. D. and refuse to issue a health certificate based on such examination.

In reply I wish to advise that the section that requires an examination by a physician of employees of hotels, et cetera, is part of our hotel law, being Section 3382 of the Compiled General Laws of Florida, 1927, Permanent Supplement. This section provides:

"Employees to be free from communicable disease. No person suffering from any contagious or communicable disease shall be employed in any hotel, restaurant, apartment house or rooming house to prepare or handle food, drink, dishes, towels, or linens, or in any other capacity whereby such disease might be communicated to guests or tenants.

"All employees shall furnish health certificates including a Wasserman test, signed by a registered licensed physician of the State of Florida, when-

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ever the hotel commissioner or his deputy, in his discretion, deems it necessary for the protection of public health."

You will note that the health certificate must be signed by a registered licensed physician. I find that the word "physician" is defined by Webster's New International Dictionary as follows:

"Physician—1. A person skilled in physic or the art of healing; one duly authorized to treat diseases, esp. by medicines; a doctor of medicine;—often distinguished from a surgeon."

I, therefore, am of the opinion that only a physician who has passed the State Board of Medical Examiners would be qualified to make a health certificate. This conclusion is confirmed by the fact that throughout the statutes relating to the State Board of Medical Examiners, the word "physician" is repeatedly used, whereas, doctors who are practicing some other form of the healing art are not referred to in our statutes as physicians.

For instance, in our statutes relating to osteopaths, being Section 3417, et seq., C. G. L., osteopaths are referred to as practitioners, osteopathic physicians, and wherever the word "physician" is used, it is always used in connection with the word "osteopathic."

The same is true of the statute creating the State Board of Chiropractic Examiners, being Section 3435, Compiled General Laws. They are referred to there as Doctors of Chiropractic, and whenever the word "Doctor" is used in this Act, I find it is always used in connection with the word "chiropractic."

Sections 3469, et seq., C. G. L., relating to Naturopathy, refers to practitioners of this art of healing as "naturopathic physicians," and wherever the word "physician" is used in this Act, it is always coupled with the word "naturopathic."

I, therefore, answer your question in the affirmative.

September 5, 1940—O-918.

HOTELS—COPY OF LAWS REQUIRED TO BE POSTED —PENALTIES FOR VIOLATION

Dear Sir:

You call my attention to a specific instance in which a hotel has failed to comply with the provisions of Section 38 of Chapter 16042, Laws of Florida, Acts of 1933, requiring hotels to post copies of Sections 40, 45 and 46 of that statute in each bedroom. You inquire as to whether this violation is punishable under Section 48 of said Chapter 15042.

It is my opinion that this violation is punishable under said Section 48, for it constitutes a failure to carry out a duty imposed upon the hotel keeper by law.

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November 5, 1940—O-979.

INSANE PERSON—DOMICILE OF WIFE SAME AS HUSBAND

Dear Sir:

This will acknowledge receipt of your letter of November 2. You request me to answer the following question: "Whether or not a patient, who has been for several years adjudged incompetent and hospitalized in another State, would acquire a claim against the State of Florida for hospitalization by virtue of the fact that the patient's husband subsequent to her commitment to a mental institution in another State moved to Florida, and remained long enough to acquire citizenship rights, entitles his wife to hospitalization at the expense of the State of Florida."

In reply I wish to advise that the courts are in accord that the domicile of a wife is that of her husband unless she has for the purpose of securing a divorce separated from her husband with the intention of establishing residence for such purpose. Our Supreme Court has held:

"Generally, domicile of wife is that of husband, and is ordinarily not affected by fact that wife is living apart from husband in absence of a judicial decree of separation or divorce." *Bowmall v. Bowmall*, 127 Fla. 747, 174 So. 14.

Under Section 9, Chapter 19163, Acts of 1939, the right of an incompetent to have hospitalization at the expense of the State of Florida is dependent upon whether or not the person adjudged incompetent is domiciled in the State of Florida. I am of the opinion that since the husband has become a citizen of Florida, the domicile of the wife is that of the husband.

I do not find where the Supreme Court of Florida has considered the exact question you have propounded. However, I do find in the case of *Gluc v. Klein*, 226 Mich. 175, 197 N. W. 691, the facts were almost identical. In that case the husband and wife had been domiciled in Minnesota and the wife had been committed to an asylum in that State. Subsequently, the husband moved to Michigan and the Michigan Court held that the wife's domicile followed her husband to Michigan even though the wife remained in the insane asylum in Minnesota and regardless of the fact that the husband changed his domicile subsequent to the wife's being adjudged insane.

I also find in the more recent case of *Hairs v. Hairs*, 222 Mo. App. 941, 300 S. W. 540, the Court there held that the wife's domicile followed the husband's domicile when the husband established a domicile in Missouri. Likewise, in the case of *In Re: Fischer's Estate*, 271 N. Y. S. 101, Affirmed 277 N. Y. S. 939, 243 App. Div. 685, it was held that the domicile of the wife who did not maintain a separate home followed that of the husband.

I, therefore, am of the opinion that Carolien V. Dodd, incompetent, should for the purpose of admission in your Institution, be considered upon exactly the same basis as any other citizen of the State of Florida.

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January 17, 1939—O-68.

INSANE PRISONER—STATE NOT LIABLE TO NEW YORK STATE
FOR CARE AND TREATMENT*Dear Sir:*

I am in receipt of your letter of the 12th instant, enclosing copy of letter from Philip Smith, Chief Medical Inspector, Department of Mental Hygiene, State of New York, to you dated January 10, 1939, relating to one Henry Brown, alias James Williams. It appears from the Smith letter that Henry Brown, alias James Williams, escaped from the State Prison of the State of Florida about August 6, 1928; that he traveled about for some time and finally reached New York, where he immediately resumed his criminal career, and on June 19, 1930, was sentenced to Attica Prison in New York for ten years; that he became mentally disturbed while in Attica Prison and was transferred to Dannemora State Hospital on March 16, 1933; that at the expiration of his commuted sentence on May 2, 1935, he was examined by two qualified examiners in lunacy, and committed to Dannemora as an insane patient in the manner provided by law, and is still an inmate of that institution. Upon the basis of these facts, you request my opinion as to whether the State of Florida is liable for the care and treatment of said Henry Brown, alias James Williams.

From the facts stated, it appears that this party voluntarily escaped from the State Prison and left the State of Florida while he was in possession of his mental faculties; that he became insane while an inmate of Attica Prison in the State of New York where he was sentenced for violation of the laws of that State.

On the basis of these facts, I am of the opinion that Florida is not liable for the care and treatment of the said Henry Brown, alias James Williams, notwithstanding his former sentence and commitment to the State Prison of Florida, and notwithstanding the fact that his mother resides in Miami, Florida.

January 21, 1939—O-13.

INSECTICIDES AND FUNGICIDES—REGISTRATION

Dear Sir:

This is in reply to your letter of January 19 in which you state the following question:

"May we legally require the registration by manufacturers under the Insecticide and Fungicide Law of drugs and chemicals susceptible of use for control of insecticides and fungicides but which are also commonly used in many other ways? To illustrate, we have a complaint alleging that a wholesale drug firm in Tampa had recently made delivery of a quantity of Tartar

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Emetic to a Gladiola grower in Manatee County who was using same for insect control.

"The question is, can we require either the manufacturer of Tartar Emetic or the Tampa Drug Company, its distributor, to register Tartar Emetic with our Department under the Insecticide and Fungicide Act in the light of the fact that Tartar Emetic may be and is commonly and generally used in many ways other than for insecticidal or fungicidal purposes." (Italics ours.)

Section 2 of Chapter 17992, Laws of Florida, Acts of 1937, requires any agricultural insecticide or fungicide to be branded or labeled so as to fully apprise prospective purchasers of the ingredients. Section 3 of the statute requires each brand to be registered with the Commissioner of Agriculture. The statutory requirements apply to those substances which are "agricultural insecticides" or "fungicides" within the definition set forth in Section 12 of the Statute which reads as follows:

"The term 'agricultural insecticide' or 'fungicide' shall be construed to include and mean any substance or mixture of substances *intended to be used* for preventing, destroying, repelling or mitigating any and all insects, fungi, or other plant pests, collectively or individually, which may infest or be detrimental to vegetation." (Italics ours.)

The words "intended to be used" in the above definition are very significant. By using these words the Legislature recognized the fact that certain chemicals have many varied uses which could well include use as an agricultural insecticide or fungicide. The Legislature therefore prescribed as the test of whether a substance is to be classified as an agricultural insecticide or fungicide the intention that it should be used as such. This intention quite obviously must be that of the seller for unless he sells the substance for use as an agricultural insecticide or fungicide he could not be charged with notice that the substance would be so used.

It is therefore my opinion that if any substances or chemicals are sold on representations made by the seller that they are susceptible of use as agricultural insecticides or fungicides such substances and materials come within the definition of agricultural insecticides and fungicides and must be registered with you.

May 31, 1940—O-814.

MILITARY FORCE—POWER OF GOVERNOR IN CASE OF WAR
TO INCREASE THE DEFENSE UNITS OF STATE

Dear Sir:

This will acknowledge receipt of your letter of May 29 enclosing a letter from the Honorable Vivian Collins, the Adjutant General. You request me to advise you under what legislative provision a military force can be organ-

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ized in the event of an emergency which would take our National Guard from the State.

In reply I wish to advise that I have carefully considered the Adjutant General's letter and it appears to me that the statutes he mentions fully cover the situation, i. e., Section 2079, Compiled General Laws of Florida, 1927, provides for "County Guards" which, of course, is limited to service in that particular county. However, the Act is so drawn that it would not interfere with any National Guard organization.

Section 2019, Compiled General Laws of Florida, as set out by the Adjutant General, provides:

"* * * The Governor, as commander-in-chief, shall have the power, in case of war, invasion or insurrection, riot or imminent danger thereof, or the calling of all or any portion of the militia of Florida into the service of the United States, *to increase the land and naval forces of this State, and organize the same in accordance with the existing rules and regulations governing the armies of the United States, or in accordance with such other system as the Governor may consider the exigency to require; and such organization and increase may be either pursuant to or in advance of any call made by the President * * *.*" (Italics ours.)

This provision of our statutes seems to take care of any situation such as the Adjutant General has in mind, and while I note that he seems to be of the opinion that the "county guard" is an unnecessary force, it is entirely possible that since this particular organization cannot go beyond the limits of any county, it might become necessary to proceed under Section 2019, Compiled General Laws of Florida, above quoted. However, this does not mean that it would not also, because of some peculiar condition, be advisable to have a "county guard."

I, therefore, can see no inconsistencies between the two sections of the statutes above referred to.

Answering your question specifically, I am of the opinion that in the situation mentioned in Section 2019, C. G. L., that you, as Governor, would have authority to organize such "system" or "force" as the exigencies of the situation require.

December 2, 1940—O-998.

**MINORS—EXECUTION OF RELEASE WOULD NOT BAR ACTION
FOR INJURY DAMAGES**

Gentlemen:

Your recent letter with attached form of release has been received with the request for an opinion whether a minor signing such a form would have any right after reaching majority to sue for damages because of an injury received while performing services covered by such release.

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Our Supreme Court has frequently held that a contract executed by a minor may be voided by him upon reaching his majority. It has also held in *Camp v. Hall*, 39 Fla. 535, 22 So. 792, that where an injury to a minor through the negligence of another is permanent, the minor may recover damages in a suit brought by him after reaching his majority, irrespective of the right of the parent to recover for loss of services during minority. If the injury, however, is of temporary nature the parent or guardian only has a right to action.

It is my opinion that the form enclosed by you, which is returned herewith, is sufficient as a release of any rights accruing to the parent or guardian, whether the injury is temporary or permanent, but would not bar any action by a minor upon reaching his majority where the injury is permanent.

August 15, 1940—O-896.

NAVIGABLE WATERS—RIPARIAN RIGHTS

Dear Sir:

I have your letter of the 14th instant requesting answers to five questions submitted reading as follows:

"Question No. 1. If a city owns a strand of beach to which it has access, and there is a beach strand extending on the right and on the left of the city's property, does the public have a legal right to use this other beach strand which is in front of privately owned property fronting on the beach, but the public does not trespass on the private property in gaining access to this particular beach?"

"Question No. 2. Does riparian right to a beach strand give the riparian right owner legal authority to prohibit the public from use of the beach in front of the riparian right owner's home or real estate?"

"Question No. 3. Would there be any legal difference whether questions Numbers 1 and 2 referred to an ocean beach, a lake beach, or a river beach?"

"Question No. 4. If there is any difference, please specify."

"Question No. 5. Would it make any difference if the beach strand were separated from the real estate by a public highway?"

The law applicable is expressed in headnotes 1 and 2 in the case of *White v. Hughes* (Fla.), 190 So. 446, which headnotes I quote as follows with certain words underscored by the writer in headnote 1:

1. "A riparian or littoral proprietor, who owns to ordinary high-water mark of ocean, gulf or other navigable waters, has common-law rights in adjacent waters, such as access to waters, with rights of bathing and fishing in and navigation over such waters, *in common with general public*, subject to lawful regulation by sovereign State in interest of public, and subject to authority of Congress as to commerce and navigation.

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2. "Private ownership stops at high-water mark, and State holds foreshore in trust for its people for purposes of navigation, fishing and bathing."

In answering your questions, I assume that the upland owner has acquired title only to the upland and that the title to the beach and adjacent submerged waters is still vested in the State of Florida since title to the bottoms of all submerged navigable waters, including the shore space between low and high water mark, is vested in the State in its sovereign capacity.

Question No. 1 is, therefore, answered in the affirmative.

Question No. 2 is answered in the negative.

Question No. 3 is answered in the negative, except in the case of non-navigable lakes or rivers, title to which has never been vested in the State and which may be privately owned.

Question No. 4 is answered in answer to Question No. 3.

Question No. 5 is answered in the negative.

April 13, 1940—O-785.

PENSIONS—FIREMEN'S RELIEF—MUNICIPALITIES ENTITLED TO PARTICIPATE

Dear Sir:

This is in reply to your letter of April 10, in which you request my opinion as to whether the City of Kissimmee is authorized under the provisions of Chapter 19112, Laws of Florida, Acts of 1939, to create a Firemen's Relief and Pension Fund. You state that the Kissimmee Fire Department, with the exception of one regularly employed driver, is composed of volunteer firemen who receive regular compensation of \$2.00 a month, plus a fixed amount for their services at each fire.

To determine whether a municipality comes within the provisions of Chapter 19112, it is essential to consider the provisions of Section 1 of that Act, which reads as follows:

"Section 1. That there is hereby created a special fund to be known as the Firemen's Relief and Pension Fund, exclusively for the purposes provided in this Act, in each incorporated city or town of this State, heretofore or hereafter created, which now has or which may hereafter have a *regularly organized fire department* and which now owns and uses or which may hereafter own and use equipment and apparatus of a *value exceeding five thousand dollars in serviceable condition*, for the extinguishment of fires, and which said city or town does not presently have established by law a similar fund." (Italics ours.)

If the fire department of a municipality comes within the provisions of Section 1, above set forth, it is authorized to provide for the creation of a Firemen's Relief and Pension Fund, even though the department is largely

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made up of regularly appointed and enrolled volunteer firemen. Section 15 of Chapter 19112 has particular application to municipalities having such fire departments.

December 27, 1940—O-1023.

PENSIONS—FIREMEN'S RELIEF AND PENSION FUND—
PROCEEDS OF WARRANTS TO GO TO
GENERAL REVENUE FUND

Dear Sir:

I am in receipt of your letter of the 20th instant, in which you enclose copy of ordinance of the City of Plant City, Florida, revoking an ordinance imposing a tax on insurance companies for the Firemen's Relief and Pension Fund, and stating that a warrant had been issued in the sum of \$105.61 chargeable against the Firemen's Relief and Pension Fund in accordance with Section 7 of Chapter 19112, Laws of Florida, Acts of 1939. You further state that this warrant was returned to you by the Clerk of the City of Plant City on the ground that that city was no longer operating under the Firemen's Relief and Pension Law, and you ask my opinion as to whether or not this warrant should be cancelled and restored to the Firemen's Relief and Pension Fund, or whether it should be deposited in the General Revenue Fund, to which it would have gone had it not been affected by Chapter 19112.

Section 6 of Chapter 19112, Acts of 1939, allows the cities to assess this tax, but Section 9 provides as follows:

"The tax herein authorized shall in no wise be additional to the similar State excise or license tax imposed by Section 911, of the Revised General Statutes of Florida as the same is amended by Chapter 10150, Laws of Florida, 1925, but the payer of the tax hereby authorized shall receive credit therefor on his said State license or excise tax and the balance of said State excise or license tax shall be paid to the State Treasurer as is now provided by law."

It is my opinion that since the proceeds of the warrant would have gone into the General Revenue Fund, had it not been for the provisions of Chapter 19112, the same should now be done since the City of Plant City is no longer operating under this Act.

April 18, 1940—O-788.

PENSIONS—FIREMEN'S RELIEF—EFFECT OF REPEAL OF
MUNICIPAL ORDINANCE CREATING FUND

Dear Sir:

This is in reply to your letter of April 15, in which you enclose a letter from the City Attorney of Ocala, Florida.

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It appears that the firemen of Ocala no longer favor the creation of a relief and pension fund under Chapter 19112 of the Laws of Florida, Acts of 1939. I am advised that such firemen have unanimously opposed any further deduction of two per cent of their salaries for this fund under Section 4 of that statute.

You request my opinion with regard to what effect a repeal of the ordinance of Ocala, imposing a 1 per cent gross receipts tax on insurance premiums, enacted pursuant to Chapter 19112, would have on the proceeds from such tax now in your custody and which will come into your custody for the period of time during which the ordinance has been in effect. It is my opinion that the proceeds of such a tax are municipal funds and that your only duty with regard to same is to distribute the net proceeds pursuant to the provisions of Chapter 19112.

There may be some doubt with regard to the right of a city to reject the provisions of Chapter 19112, if that city comes within the classification set forth in Section 1 of the Act. That is a matter, however, which cannot concern you, as State Treasurer. So long as the city has an ordinance in force pursuant to Section 5 of the Act, imposing a tax on insurers, as therein provided, the proceeds of such a tax must remain municipal funds.

August 8, 1939—O-20.

PENSIONS—PERSON DESIGNATED BY DECEASED PENSIONER
TO RECEIVE UNDER CHAPTER 18045, ACTS OF 1937

Dear Sir:

I am in receipt of your letter of the 4th, in which you state as follows:

"Chapter 18045, Laws of Florida, Acts of 1937, provides for the designation of a nominee to receive the amount due as a pensioner after the date of the death of a pensioner.

"Amy L. Davis who received a School Teacher's pension died July the 3rd, 1939. On July the 12th, 1938, she designated under the provisions of Chapter 18045, Laws of Florida, Acts of 1937, Maggie Ross to receive the amount of pension accrued to her at the time of her death.

"I am in receipt of a letter from Honorable B. D. Hiers, County Judge of Alachua County, enclosing 'Letters of Administration,' of the appointment of Lena Irving as Administratrix of the Estate of Amy L. Davis, deceased, who requests that warrant be made payable to Lena Irving."

You request my opinion as to whether or not this money should be paid to the Administratrix of the Estate of the pensioner or to Maggie Ross, who was designated to receive the money, as provided by Chapter 18045, Laws of Florida, 1937. Sections 1 and 2 of Chapter 18045 provide as follows:

"Section 1. Upon the death of any pensioner, all money accrued from the date of last payment to date of death shall be paid to the person who

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shall have been designated by pensioner; said designation to be under oath and on form prescribed by Comptroller and filed in the office of Comptroller during the lifetime of pensioner. Upon the death of pensioner, the Comptroller is hereby directed to issue warrant, payable to the person so designated by pensioner, immediately upon notice of the death of said pensioner.

"Section II. The Comptroller is hereby directed to pay to the estate of all pensioners of the State of Florida who departed this life between the first day of August, 1933, and the date upon which this Act takes effect all money that had accrued upon the pension of the pensioner at the time of the death of the pensioner. There is hereby appropriated out of the Pension Tax Fund in the State Treasury an amount sufficient to pay the sums due under this section."

It is clear to me from this statute that where a person has designated a named person to receive pension money due him after the pensioner's death, then that this money should be paid to such person named, as provided by this Chapter, regardless of whether or not there has been any probate action taken on the estate of the deceased pensioner.

June 23, 1939—O-393.

PENSIONS—WARRANT TO BE ISSUED ONLY TO PERSON
DESIGNATED—PROCEDURE FOR ENDORSEMENT

Dear Sir:

This will acknowledge receipt of your letter of June 22 in regard to Chapter 18045, Acts of 1937, in which you asked for my opinion "as to whether or not the person so designated by the pensioner should die or become incapacitated to such an extent that they were unable to endorse said warrant if any one other than the person so designated would be allowed under this law or any other law to endorse the warrant so that same may be paid or could the Comptroller issue a warrant to any one other than the person so designated."

In reply I wish to advise that the pertinent part of Chapter 18045, Acts of 1937, provides:

"Upon the death of any pensioner all money accrued from the date of last payment to date of death shall be paid to the person who shall have been designated by pensioner; said designation to be under oath and on form prescribed by comptroller and filed in the office of the comptroller during the lifetime of pensioner. Upon the death of pensioner, the comptroller is hereby directed to issue warrant, payable to the person so designated by pensioner, immediately upon notice of the death of said pensioner."

I cannot see how it would be possible to construe this language so as to permit you to issue a warrant to any person other than the one designated by the pensioner in the form and in the manner prescribed by said law.

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However, if the person so designated by the pensioner merely becomes incapacitated to such an extent that he is unable to endorse said warrant, I suggest in this event that the procedure be the same as used in connection with legal documents where a signature is required thereupon.

July 12, 1939—O-462.

**PRISONER—AUTHORITY OF GOVERNOR TO ORDER TRANSFER
FROM ONE JAIL TO ANOTHER**

Dear Sir:

In response to your request of the 10th as to your authority to order the transfer of Woodrow Wester from the county jail of Jackson County to some other jail, I would state that Section 8541 is as follows:

"When in the opinion of the Governor the interests of the State demand it, the circuit judge shall, upon the request of the Governor, make an order directing that any person held under a criminal charge shall be confined in the jail of another county of the State than that in which the offense charged is alleged to have been committed. No such order shall be made except by the judge of the circuit in which the county where the offense is alleged to have been committed is located. Such order shall be of full force and effect throughout the State, but the county to which the prisoner charged or convicted is sent, or any officer thereof, is not required to incur or pay any expense or charge of maintaining such prisoner."

Therefore, if in your opinion the interests of the State demand it, you can request the circuit judge of Jackson County to transfer this prisoner to another jail. This is the only procedure that I know in which such a transfer may be made.

April 29, 1939—O-163.

**PRISONERS—CASH PAYMENT AUTHORIZED UPON
DISCHARGE ONLY**

Dear Sir:

In your letter of the 28th instant you state that occasionally a State prisoner becomes insane and is transferred to the State Hospital, and in some instances is there held for observation beyond the term of his imprisonment in the State Prison.

You thereupon inquire whether the cash payment to be furnished under Section 8590, Compiled General Laws, should be paid over at the expiration of the term of imprisonment in the State Prison for their use when wanted.

Section 8590, Compiled General Laws, provides that each convict who serves a sentence at hard labor in the State Penitentiary shall, when discharged, be furnished with \$5.00 to provide the necessities of life until he

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can procure work. The intent of this Act was and is to assist State prisoners after their discharge, and it should not be turned over to them until their discharge, whether they are in the State Prison or whether in the State Hospital as State prisoners.

March 8, 1940—O-750.

PRISONERS ENTITLED TO RECEIVE CREDIT ON FINE BASED
ON IMPRISONMENT

Dear Sir:

This office is in receipt of your letter of March 7, enclosing copy of a letter under date of February 29 addressed to you by the Clerk of the Circuit Court of Sumter County, in which the clerk asked the question as to the proper construction of Section 8557 of the Compiled General Laws of Florida, 1927.

Section 8557 of the Compiled General Laws of 1927 is the same as Section 1 of Chapter 6176 of the General Acts of the 1911 Legislature. Sections 2 and 3 of Chapter 6176 of the General Acts of 1911 contain only formal provisions and do not add to the substantial provisions of Section 1 which is as follows:

"Section 1. Every person who may be imprisoned in the county jail for failure to pay a fine and costs, or either, under sentence imposed upon conviction for crime shall be entitled to receive, together with subsistence, a credit on such fine and costs, or either, as the case may be, in proportion to the time such person may be imprisoned."

A thorough search has been made for decisions of the Supreme Court of Florida construing or applying this section, and no Florida case has been found in which the interpretation or application of this section has been decided. A search has also been made for previous opinions of the Attorney General as to the proper construction and application of this section, also without success.

A check of the decisions of the courts of last resort of other states has disclosed that there are provisions in the laws of other states which are somewhat similar to the quoted section. For instance, it has been found that in states which have a statute providing that a prisoner who is imprisoned in default of payment of fine and costs shall receive credit at the rate of \$2.00 per day on such fine and costs, the courts of last resort have held that the prisoner after serving a portion of his time in default of payment of fine and costs can pay the balance of the fine and costs due under the judgment of the court imposing such fine and costs, after deductions from the original amount of the fine and costs at the rate of \$2.00 per day for each day actually served have been made.

It does not appear that the section quoted is in conflict with any constitutional provision of this state or of the United States, and therefore it

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should be given effect. There appears to be no uncertainty in the language of the section.

I am therefore of the opinion, and so advise you herewith, that the question propounded to you by the Clerk of the Circuit Court of Sumter County:

"Does this mean that if a sentence is imposed on a person for a period of sixty days in jail or to pay a fine and costs of \$75.00, and the person serves thirty days of this sentence, would he be entitled to pay \$37.50 and demand a release from the sentence?" should be answered in the affirmative.

In so answering this question it is assumed that the aggregate of the fine and costs is \$75.00, and that the sum of \$75.00 is not simply the fine without the costs having been added. In other words, the prisoner should not be allowed to pay a proportionate part of his fine only, and have a right to demand a release from the balance of the sentence, but should be required to pay a proportionate part of the total of the fine and costs assessed.

It is also assumed in answering this question in the affirmative that the prisoner was not sentenced to be imprisoned for a period of sixty days *and* to pay a fine and costs aggregating \$75.00, but that the prisoner was sentenced to pay a fine and costs aggregating \$75.00 *or* in default thereof to be imprisoned for a period of sixty days. It is only if the present imprisonment of the prisoner under the sentence is in default of the payment of fine and costs that the quoted section would require him to be released upon payment of the proportionate part of the fine and costs.

January 19, 1940—O-702.

RACE TRACK MONEYS—PAYMENT UNDER CHAPTER 19386,
ACTS OF 1939

Dear Sir:

I have your letter of the seventeenth in which you inquire as to the method of distribution of the race track fund payable to Union County under Chapter 19386.

Section 1 of Chapter 19386 provides as follows:

"Section 1. That all moneys payable to Union County, Florida, for the years 1940 and 1941 as race track taxes under the provisions of Chapter 14832, Laws of Florida, Acts of 1931, as amended, shall be apportioned and distributed as follows:

"Thirty-Five Hundred Dollars (\$3,500.00) to the Board of Public Instruction of Union County, Florida, for the General School Fund of said County.

"Five Thousand Dollars (\$5,000.00) to Lake Butler Special Tax School District No. 7, to be for the interest and sinking fund account of said District.

"Four Thousand Dollars (\$4,000.00) to the County Bond Trustees for the operating expense fund of said Bond Trustees, and

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"The remainder thereof to the Board of County Commissioners of said Union County, Florida, for the General Revenue Fund of said County."

You inquire as to whether or not you should pay the first \$3,500.00 of the county's distributive share to the Board of Public Instruction of Union County, the next \$5,000.00 to be paid to the Lake Butler Special Tax School District No. 7, and the next \$4,000.00 to the County Bond Trustees, and the remainder to the Board of County Commissioners of Union County, or should you pro rate each distribution among the first three funds until such time as sufficient amount is distributed to meet the payment of these funds, and then give the remainder of the fund to the Board of County Commissioners.

It seems clear to me that it was the intention of the Legislature that you should pro rate the distribution of Union County's share of the race track funds to the first three funds mentioned in the Act. This distribution should be made on the following basis:

- 7/25 to the Board of Public Instruction of Union County,
- 10/25 to Lake Butler Special Tax School District No. 7, and
- 8/25 to the County Bond Trustees

until the full amounts have been paid as directed by this law, then you should send the balance of the county's distributive share to the Board of County Commissioners of Union County, Florida.

January 19, 1940—O-701.

RACE TRACK MONEYS—PAYMENT UNDER CHAPTER 19282—
ACTS OF 1939

Dear Sir:

I am in receipt of your letter of the seventeenth in which you state as follows: "Section 2 of said Chapter provides that the first \$15,000.00 accruing to Pasco County during each of its fiscal years 1939-1940, 1940-1941 and 1941-1942 one-half shall be paid to the Treasurer of the State of Florida, as ex officio Treasurer of the Teachers' Salary Fund, to the credit of the Board of Public Instruction for the county of Pasco."—and then inquire as to whether you should send a check for the full amount of the county's distributive share of the proceeds under the race track law to the Board of County Commissioners of Pasco County, and they in turn send one-half of the first \$15,000.00 to the Treasurer of the State of Florida, as ex officio Treasurer of the Teachers' Salary Fund or whether or not the Comptroller should divide each distribution until it reached \$15,000.00 and send his warrant to the Board of County Commissioners of Pasco County for one-half the amount distributed and another warrant to the Treasurer of the State of Florida, as ex officio Treasurer of the Teachers' Salary Fund to the credit of the Board of Public Instruction of Pasco County. You also inquire as to whether or not all funds distributed in excess of \$15,000.00 during the fiscal

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years mentioned should be paid to the Board of County Commissioners of Pasco County.

In reply to your first inquiry I would state that Section 2 of Chapter 19282, Laws of Florida, 1939, provides as follows:

"Section 2. That \$7,500.00 of the funds hereafter to accrue to Pasco County under the provision of Chapter 14832, Laws of Florida, Acts of 1931, or acts amendatory or supplemental thereto, in each of the said county's fiscal years of 1939-1940, 1940-1941, and 1941-1942, being a total of \$22,500.00, be, and the same is hereby pledged as security for the payment of the principal of and interest upon the loan hereinabove authorized. Of the first \$15,000.00 accruing to Pasco County during each of its fiscal years 1939-1940, 1940-1941, and 1941-1942 as the result of disbursements made under the said Act of 1931, one-half of each payment due said county shall be paid to the Treasurer of the State of Florida, as ex officio Treasurer of the Teachers' Salary Fund, to the credit of the Board of Public Instruction for the County of Pasco, State of Florida, and shall be by said ex-officio Treasurer disbursed solely in the payment of the principal of and interest on said loan. Any residue of said total of \$22,500.00 after full and complete discharge of said loan and the interest thereon, shall be by said ex officio Treasurer refunded to the Board of County Commissioners of said county. All disbursements by the said County Treasurer ex officio of said moneys out of the State Teachers' Salary Fund shall be by proper warrant of the Board of Public Instruction for the County of Pasco, State of Florida."

It seems clear from this provision of the law that it was the intention of the Legislature that the \$7,500.00 should be paid by you directly to the State Treasurer as ex officio Treasurer of the Teachers' Salary Fund. It is also my opinion that you should divide each distribution until it has reached \$15,000.00, sending your warrant for one-half of the amount distributed to the Treasurer of the State as ex officio Treasurer of the Teachers' Salary Fund to the credit of the Board of Public Instruction of Pasco County and that you should send a warrant for the other one-half to the Board of County Commissioners of Pasco County.

Unless there is some other special Act, and I have been unable to find any such Act, directing how you should distribute the proceeds of Pasco County's distributive share of the race track funds, it is clear that you should send all the surplus over and above the \$15,000.00 to the Board of County Commissioners of Pasco County, Florida.

March 29, 1940—O-774.

STATE EMPLOYEES—GARNISHMENT OR ORDER FOR SUIT MONEY

Dear Sir:

I have examined the court order you submitted to me today in the case named, pending in Franklin County.

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I find that this order substantially provides that you shall deduct from the pay of the defendant the sum of \$40.00 per month including the month of March, and to pay same over to the petitioner in said case for the support and maintenance of their minor children.

I also find that the Court held that it had jurisdiction over the subject matter under Section 4992, Compiled General Laws of Florida, 1927. This Act provides that the Courts are authorized to order "money and other things due to any person or public officer, State or county * * * shall be subject to attachment or garnishment to enforce the orders or decrees of the courts of this State for alimony, suit money or support, or other orders or decrees made by the courts of this State in suit for divorce or alimony; and in such cases where the money or other thing sought to be attached or delayed is the salary of a public officer, State or County, the writ of attachment or garnishment may be served upon the public officer whose duty it is to pay such salary, who shall respect and obey the same as provided by law in other cases; * * *"

While the statute refers to public officers, the Circuit Court of Hillsborough County in the case of Dupree v. Dupree struck an answer that you filed that raised the question that the statute does not apply to public employees.

I therefore do not believe that in a case of this kind you would make much headway in the courts upon this particular question. However, I do not think that need now be considered for the reason that we must assume that the Court properly construed said section and that its order is valid so long as same stands unreversed or has not been superseded. In view of the fact that you have raised the question previously as to public employees, I do not think it incumbent upon you to do so in this case.

I do believe that you should immediately notify the defendant of said order and that you intend to comply with the same so that if he desires to do so he may appeal and supersede the same or take such action as he may be advised.

July 6, 1939—O-434.

STATE EMPLOYEES—IF ENTITLED TO COMPENSATION WHEN
UNABLE TO WORK AS RESULT OF ILLNESS

Dear Sir:

This will acknowledge receipt of a copy of a letter dated July 5 addressed to you from the Governor, together with your letter to the Governor of June 30. The Governor has requested that I give you an opinion in the matter.

You state that for the past year there has been in the service of the Commission as field nurse, Miss Agnes McLean, and that she was sent by the Commission to Peabody College at Nashville for special training, and while there she suddenly became ill and an examination by physicians there

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reveals that she has tuberculosis. You state that it has been the practice of the Commission when nurses are in school to pay their transportation, tuition and a stipend during the school course of \$100.00 per month. You state further that you are not familiar with the policy of the State with regard to continuance of salary or stipend for employees who become ill in the service of the State and that this lady will in all probability be unable to work for a year, and that you would like to know what could be legally done regarding payment to her for this period or any part thereof.

In the past whenever this question has arisen, the head of the particular department involved has followed his own discretion, taking into consideration the period of time the employee has been in the service of the State, and whether or not his condition was caused or aggravated by such services.

You probably know that the State maintains in connection with the counties, a tuberculosis sanatorium at Orlando, and it might be possible for you to work something out that would be of much assistance to this young lady with the Commission in charge of this hospital. Mr. W. T. Edwards of your city is chairman of the same.

July 20, 1939—O-485.

STATE EMPLOYEES—PAYMENT OF SALARY OF DANIEL M. WHITE, DECEASED

Dear Sir:

I am in receipt of a letter from Dr. J. H. Therrell, Superintendent of the Florida State Hospital, in which he states that Mr. Daniel M. White, an employee of the hospital, died on July 8, 1939, without collecting his June salary, although a warrant had been issued therefor, and also without collecting the salary due him for the first eight days of July. Dr. Therrell enclosed a letter signed by all his children, all of whom are over the age of twenty-one, requesting that the amount due Mr. White be paid to one of the children, Mr. William W. White. Dr. Therrell further stated that you desired my opinion as to whether or not you could issue a warrant for the amount due Mr. Daniel M. White to Mr. William W. White.

It is my opinion that you do have authority to pay this claim to Mr. William W. White, having a proper request from all the other children. Sections 7068 and 7069, Compiled General Laws of Florida, 1927, provide as follows:

It shall be lawful for any employer, in case of the death of an employee, to pay to the wife or husband, and in case there is no wife or husband, then to the child or children, provided the child or children be over the age of eighteen years, and in case there is no child or children, then to the father or mother, any wages that may be due said employee at the time of his death.

"Any wages so paid under the authority of this Chapter shall not be considered as assets of the estate and subject to administration."

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The law expressly provides that this be done; however, since the warrant for June has already been issued, I believe it would be better to recall this warrant and issue another to Mr. William W. White for its amount.

December 30, 1940—O-1025.

STATE OFFICERS—RETIREMENT AND APPOINTMENT OF SUCCESSOR

Dear Sir:

I have before me your letter of December 30. You attach thereto a letter from the Honorable W. V. Knott, State Treasurer. Mr. Knott states:

"* * * having attained the age of more than seventy years, and having been an official and employee of the State of Florida for more than thirty years, I hereby retire from the office of State Treasurer of the State of Florida, with the right to be paid in accordance with the provisions of Chapter 17274, Laws of Florida, Acts of 1935, providing for the retirement of certain State officials and employees with pay under certain conditions, which Act of the Legislature and the terms and conditions thereof are hereby accepted by me and which retirement is to be effective January 3, 1941."

Mr. Knott, in support of his foregoing statement, attached thereto a record of his service as an official and employee of the State of Florida which shows that Mr. Knott has an aggregate of service of more than thirty years.

You request me to advise you if Mr. Knott's communication to you "creates a vacancy on the 3rd day of January, 1941," and your duty as to the appointment of a successor for the unexpired term.

I have examined Chapter 17274, Acts of 1935, the pertinent part of which I quote:

"That from and after the passage of this Act, whenever any State official or State employee has attained the age of seventy years or more, and has served the State as either an official or employee or both for as much as an aggregate time of thirty years or more, such official or employee may retire from his office as such official or employee with the right to be paid, and shall be paid on his own requisition during the remainder of his natural life one-half the amount of the annual or monthly salary received at the time of such retirement; and sufficient money to meet the requirements of this Act is hereby appropriated out of any moneys in the State Treasury not otherwise appropriated."

I find that the statement Mr. Knott has made as to his service comes strictly within the terms of such statute, and that he has used the language of the statute in his communication to you signifying his retirement as Treasurer of the State of Florida.

I am, therefore, of the opinion that Mr. Knott has done everything

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within the meaning of said Act of the Legislature that entitles him to the reward for which the law provides for a faithful public servant, and that on January 3, 1941, his retirement from the office of State Treasurer, under his letter to you, becomes effective.

You will notice that the statute above quoted provides:

" * * * may retire from his office as such official. * * * "

I find in a compilation known as Words and Phrases, Permanent Edition, Volume 37, page 520, the word "retire" has been defined as follows:

" 'Retire' is to withdraw from active service as an officer of the army or navy; to separate or withdraw. * * * State v. Love, 145 N. W. 1010, 1013, 95 Neb. 573, Ann. Cas. 1915D, 1078."

Applying the foregoing definition to the language of the statute which Mr. Knott, as I have pointed out, has strictly followed, I find on January 3, 1941, the effective date of Mr. Knott's retirement, that he has withdrawn or separated himself from the office of State Treasurer, and that he will not be carried thereafter upon the payroll of the office of State Treasurer in that capacity, but will be paid under the provisions of the Retirement Act, to-wit, Chapter 17274, Acts of 1935, by virtue of the appropriation therein contained.

I am, therefore, of the opinion that upon Mr. Knott's retirement, effective on January 3, 1941, as State Treasurer of Florida, said office will become vacant, and that it will be your duty under the Constitution of the State of Florida to appoint a successor to Mr. Knott for his unexpired term.

May 31, 1940—O-815.

STATE ROADS—EASEMENT FOR SUBSURFACE CROSSING BY PIPE LINES

Dear Sir:

You have asked what authority you as Governor of the State of Florida, or the State Road Department, have to permit the placing of a pipe line under State roads.

You, as Governor of the State of Florida, have no power, either under the State Constitution or under any statute, to grant or deny such a permit.

The State Road Department has no power or control over county or private roads but does have control over the construction and maintenance of all State roads as hereinafter set forth.

The Florida Supreme Court in 1892 in the case of State v. Jacksonville St. R. Co., 29 Fla. 590, 10 So. 590, held that the dominant control of highways and streets is vested in the legislative power of the State. Prior to the establishment of the State Road Department the Legislature had granted to cities, counties and special road and bridge districts the right to construct and maintain the public roads. With the formation of the State Road Department by Chapter 6883, Acts of 1913, supervision was granted the depart-

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ment and in the case of *State v. Johnson*, 71 Fla. 363, 72 So. 477 the Act was held valid, the Court stating:

"We find nothing in our organic law that would prohibit the Legislature from enacting a statute taking away from said county boards, not only a part but the whole, of their powers of supervision and control of public roads and bridges, and lodging such powers elsewhere, since the control of all public highways is vested in the State absolutely without any constitutional limitations or restrictions."

By Chapter 7328, Acts of 1917, the department was given power by Section 4 "to make such rules and regulations as may be necessary for, the construction and maintenance of such highways and bridges as may by law or by resolution of any Board of County Commissioners be placed under its supervision and control." Chapter 7900, Acts of 1919, amended the 1917 Act slightly but did not change the powers granted thereunder. This Act now appears as Section 1195 R. G. S. (Sec. 1635 C. G. L.) Chapter 9312, Acts of 1923, reiterates the duty of the department "to maintain the State roads and to protect and preserve the same from trespass and injury." (Sec. 1650, C. G. L.)

Since 1917 the State Road Department has under the provisions of Section 4, Chapter 7328 and its amendment by Chapter 7900 taken full control over any construction affecting the rights of way of State roads and has granted to public utilities the right to place poles and lines upon such rights of way and to others the right to lay sewer or water pipes under the roads and bridges.

In regard to the granting of an easement for the use of the land under the State road, the Florida Supreme Court has ruled in *S. H. Kress & Co. v. City of Miami*, 78 Fla. 101, 62 So. 775, 7 A. L. R. 640 that the owner of the fee in a street (and the same would be true in regard to a road) has the right to use the subsurface subject to reasonable regulations and the obtaining of a permit from the proper authority where such use would affect in any way the maintenance or use of the street (or road).

The right of the State Road Department to give an easement for a subsurface crossing of a State road right of way depends upon its title to the right of way. Chapter 17280, Acts of 1935, gives the department power "to sell, lease or convey, or otherwise dispense of any land owned by the State and obtained for highway purposes, which shall be no longer necessary for such purposes." (Sec. 1656 [14] C. G. L. Supp.) Chapter 17307, Acts of 1935, vests in the department when a road becomes a State road "all the right, title, easements and appurtenances" held by the county or city, or dedicated to public use prior to its designation as a State road. (Sec. 2452 [2] C. G. L. Supp.)

It is, therefore, my opinion that a permit must be obtained from the State Road Department for the construction and maintenance of the subsurface crossing by a pipe line where such crossing would in any manner

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affect the construction, or maintenance, of a State road, for which the State Road Department had obtained easement by statutory, or other authority. Inasmuch as such crossing would further burden the land, permission should also be obtained from the owner of the land.

January 25, 1939—O-34.

**STATUTE OF LIMITATIONS IN EMBEZZLEMENT OR
MISAPPROPRIATION CHARGE**

Dear Sir:

In your letter of January 19, 1939, in regard to the complaint by Mrs. Gertrude Dukes against Edward P. Campbell you ask the question as to when the statute of limitations commences to run against a charge of embezzlement or misappropriation by an agent in a case wherein, as I understand it, the funds were placed by the complaining witness with an agent for investment, without a definite time fixed for investment or return of the funds, and the agent failed to invest the funds or to return them upon demand.

Upon such facts it is my opinion that the two-year statute of limitations, Section 7113, Compiled General Laws 1927, Chapter 16962, Acts of 1935, has not run against the alleged offense, if the charge be duly made under the first clause of Section 7244, Compiled General Laws 1927, provided that no demand for return of the funds was made, in writing or otherwise, by or in behalf of the owner of the funds within two years prior to the time that the prosecution shall be instituted.

The first clause of Section 7244, making it a crime for a factor "or any other person with whom any property which may be the subject of larceny is entrusted or deposited by another, shall embezzle or fraudulently convert the same, or any part thereof, to his own use, or otherwise dispose of the same, or any part thereof, without the consent of the owner or bailor and to his injury, and without paying to him *on demand* the full value or market price thereof;" defines a separate offense from an offense under the following clause of the same section, and you will note, makes a demand an ingredient of the offense so that the crime is not committed and the statute of limitations does not commence to run until such demand is made, but the demand is not required to be in writing.

There appears to be no Florida case upon the precise point, but it is generally held that allegation and proof of a demand is necessary and that the statute commences to run from a demand, under laws similar to the first clause of Section 7244.

"For example, in cases of agency, where the time for the return of collected funds is indefinite or not fixed, a demand may be necessary, but a demand is not necessary when the time of an accounting and the payment of money are definitely fixed * * *.

MISCELLANEOUS

"Under some statutory definitions of embezzlement a demand is essential."

18 Am. Jurisprudence, page 583;

9 R. C. L. page 1276-77, Sec. 18 also:

"In embezzlement limitations begin to run when it is committed, not when discovered or made manifest by failure to pay over on demand, unless the offense is made to depend on the condition precedent of a failure to comply with a demand."

16 C. J. page 225, Sec. 344; See also—20 C. J. page 430, Sec. 17, notes 36-38.

The case of *Commonwealth v. Shoener*, 216 Pa. 71; 64 Atl. 890; appeal dismissed, 207 U. S. p. 187; 28 Sup. Court, p. 110; 52 Law Ed. p. 163 is closely in point. In that case the Court sustained a conviction of a county officer for failure to pay over collections, "when thereunto legally required by the State, county or township treasurer, or other officer or person authorized to demand and receive same," under a statute containing that language; and upon a point similar to the one you suggested, the Court said:

"Equally unavailing is the plea of the statute of limitations. It was admittedly the duty of the appellant to pay over the moneys in his hands, when he learned on May 4, 1903, that they belonged to the county; but his failure to perform that duty was not a crime, and, as long as he retained the moneys without a demand from the county that he pay them over, he was not committing the statutory offense for which he was prosecuted in the present proceeding. Failure to pay over was not an offense; failure to pay over on demand was. The county, for any reason, might have indulged him, and, having done so, its indulgence, which kept him from committing a crime, cannot under the plea of the statute of limitations, be now turned into a shield by him to protect him from the consequences of his crime after his commission of it. When he was still legally liable to pay to the county the fees which he had collected, demand was made upon him to pay them over. When he failed to comply with that demand, he, for the first time, committed the offense charged against him in the present indictment, and from the time of his refusal to pay over, June 30, 1905, and from that time only, could the statute of limitations begin to run." 64 Atlantic, page 894.

The facts of the complaint before you, as I understand them, present a case of the entrusting of money to an agent for investment with no time fixed for investment or return of the funds, bringing it well within the reasoning of the cited authorities, as well as within the literal terms of the first clause of the Florida statute cited herein.

The offense defined by the first clause of Section 7244 is to be distinguished from the separate offenses defined by Sections 7247 and 7248; and the case of: *Lewis v. State*, 55 Fla. 54; 45 So. 998, which held that a demand was unnecessary, is not applicable to the facts indicated in your letter, because said last mentioned statutes, unlike Section 7244, do not expressly make a demand an element of an offense under said other Acts. The Court in said case was

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careful to limit its holdings to an offense under the old section, which is now Section 7247, saying, in reply to the contention that the indictment was defective in failing to allege the demand:

"It is a sufficient reply to this contention to say that the statute under which the indictment was framed and which we have set forth above, does not require that the indictment should allege any such demand." 45 Sou. l. c. 1001.

It may well have been the intention of the legislature by Section 7244 to make an offense of just such conduct and circumstances as is presented to you.

You will find in the footnotes to the textual citations herein, reference to several other cases which I suggest that you investigate and be prepared to present in further support of the conclusion reached.

October 21, 1939—O-609.

SUNDAY LAWS—GAME—USE OF FIREARMS

Dear Sir:

I have your letter of the 20th instant referring to Section 7652, Compiled General Laws of Florida, 1927, which reads as follows:

"Whoever uses firearms by hunting game or firing at targets upon Sunday shall be punished by imprisonment not exceeding twenty days, or by fine not exceeding twenty-five dollars."

You also refer to Section 71 of Chapter 13,644, Laws of Florida, Acts of 1929, now Section 1977 (72), Compiled General Laws of Florida, Permanent Supplement, reading as follows:

"All other general or special laws or parts of general or special laws relating to game, fresh-water fish, birds, alligators or fur-bearing animals, whether in conflict herewith or not, are hereby repealed; except that nothing in this section shall repeal the law relating to the taking of fish in Osceola County; Provided, nothing herein shall be held to alter or affect the license fees to be charged nonresidents of Florida for taking freshwater fish in Walton County, Florida, as fixed by special or local law."

You make inquiry if the above Section 7652 is repealed by said Section 1977 (72).

It is my opinion that said Section 7652 is not repealed by said Section 1972 (72) for the following reasons:

1. Section 7652 is distinctly a "Sunday Law" and appears in the Revised General Statutes, 1920, and Compiled General Laws of Florida, 1927, in a separate Article numbered 17 with the heading "Sunday Laws."

2. You will note that the use of firearms on Sunday is what is punishable, whether used for hunting game or firing at targets.

MISCELLANEOUS

3. You will also note that Section 1977 (72) does not undertake to repeal Sunday laws but only those general or special laws relating to game, fresh-water fish, et cetera.

April 28, 1939—O-174.

TRESPASS—HUNTING ON STATE-OWNED LANDS LEASED FOR
GRAZING PURPOSES—RIGHT OF LESSEE TO HUNT

Dear Sir:

I have your letter of the 26th instant, relative to the above captioned matter and reading as follows:

"We have an inquiry from Sarasota Fish and Game Association asking whether or not the lessees of State-owned lands for grazing purposes only, would have the right to bar citizens and taxpayers of the State of Florida from the right of hunting on said land.

"We would like to ask this question. In the event that the lessee of land for grazing purposes only has the right to prevent others from hunting on said area, will he have the right to hunt on said area, and if he has such right, does not our grazing lease in effect give him a hunting preserve?"

You also submitted copy of a Lease (No. 18,448), which simply recites "for grazing purposes."

In the case of *Harper v. Galloway*, 58 Fla. 255, 51 So. 226, with reference to game, the second headnote of said decision reads as follows:

"Under the common law of England the title to animals *ferae naturae* or game is in the sovereign, for the use and benefit of the people; the killing or taking and use of the game being subject to governmental control and regulation for the general good."

Section 1977 (23), Compiled General Laws of Florida, Permanent Supplement, declares all migratory birds and all game animals and fur-bearing animals within the jurisdiction of the State of Florida are and shall continue and remain the property of the State.

Section 7372, Compiled General Laws of Florida, 1927, reads as follows:

"Whoever wilfully and with the view of trespassing enters any enclosure of another, where crops or fruit of any kind are cultivated, without permission of the occupant previously obtained, or, without such previous consent of the owner or occupant, enters upon the enclosed lands of another to hunt or fish, shall be punished by imprisonment not exceeding sixty days or by fine not exceeding fifty dollars.

"Ten days' notice by poster to be posted at at least three different and conspicuous places around the enclosure, shall be given by parties wishing to avail themselves of the benefit of this section."

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Section 7401, Compiled General Laws of Florida, 1927, reads as follows:

"Whenever fences or enclosures have been or shall hereafter be dispensed with in any county or part of a county in this State by reason of any no-fence law or law making it unlawful for live stock to run at large in such county or part of a county the laws of this State applicable to offenses of trespass against realty or injury thereto, or to property thereon, or connected therewith, and in regard to hunting or fishing, or other kinds of trespass on lands, shall not become inoperative, but shall apply to such unenclosed or unfenced land with the same force and effect as if such enclosures or fences had not been so dispensed with. Notices required to be posted on land shall be sufficient if the signboard shall have thereon in letters easily seen and read the word 'posted' in letters not less than two inches long and followed by the owner's name."

With reference to the law on the subject of Landlord and Tenant, your attention is called to the case of *Baker v. Clifford-Mathew Inv. Co.*, 99 Fla. 1229, 128 So. 827, the first headnote of which reads as follows:

"During the life of a lease, the lessee holds an outstanding leasehold estate in the premises which for all practical purposes is equivalent to absolute ownership."

Your attention is further called to the case of *Gibson v. Longino, et al.*, 111 Fla. 533, 149 So. 592, in which the Court stated that "There can be no question that a lease of turpentine privilege conveys an interest in real estate."

Your attention is further called to the case of *West's Drug Stores, Inc., v. Allen Inv. Co.*, 125 Fla. 823, 170 So. 447, in which the Court stated that:

"A lessee from a landlord is an assignee of the estate for the term of the lease."

In the case of *Hawkins v. Smith*, 103 Fla. 892, 138 So. 494, the Court stated:

"It can hardly be questioned that one of the most valid and indispensable elements of a lease for a term of years is the peaceful uninterrupted enjoyment of the premises leased; otherwise a lease, in most instances, might be of little or no value."

In 36 Corpus Juris 69, Landlord and Tenant, 689, we find the following language:

"A third person who without right enters upon or otherwise disturbs the possession of the tenant is guilty of a trespass."

In 36 Corpus Juris 74, Landlord and Tenant, 695, we find this language:

"While it has been stated that no implied covenant for quiet enjoyment arises from the mere relation of landlord and tenant, the rule is ordinarily announced that such a covenant is implied in every lease, including leases by

MISCELLANEOUS

parol. So, it is held that a covenant of quiet enjoyment is implied from the use of such words as 'lease,' 'demise,' 'grant,' etc."

In 36 Corpus Juris 89, Landlord and Tenant, 722, we find this language:

"A recital in a lease of the purposes for which the demised premises are let is often held to constitute an expressed covenant on the part of the tenant to use them for no other purpose."

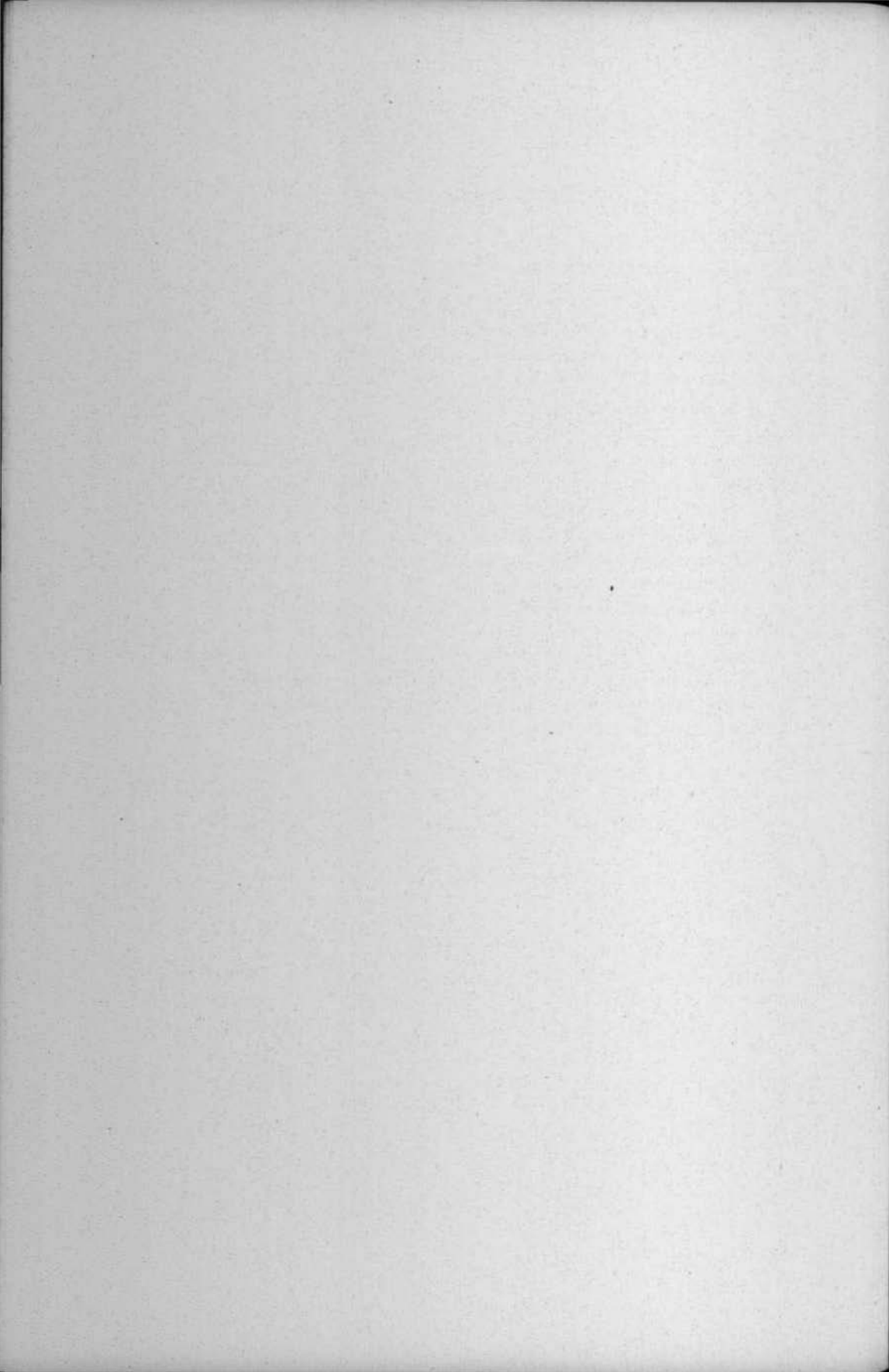
In 16 Ruling Case Law 736, Landlord and Tenant, 229, we find this language:

"The parties to a lease may by expressed provisions therein restrict the general rights of the lessee as regards the use of the demised premises."

In reply to your first question, I beg to say in my opinion a lessee of lands from the State "for grazing purposes" would have the right to prohibit and prevent other persons from hunting on the leased premises if such hunting interferes with his grazing privileges.

In answer to your second inquiry, I beg to say in my opinion such lessee would himself be authorized to hunt on such leased premises.

You make further inquiry if a lease of this kind in which the lessee is authorized to hunt would not in effect be giving the lessee a hunting preserve. In reply to this inquiry, I beg to say that while the lessee himself would have the right to hunt on the premises, and also the right to prohibit other persons from hunting on the same, it does not necessarily follow he would have the right of a hunting preserve, which might contemplate the business of propagating wild animal life. While the lessee might do such things as are incident to the use of the lands "for grazing purposes," it does not follow that he would be authorized to engage in a business unrelated to the purposes of the lease.



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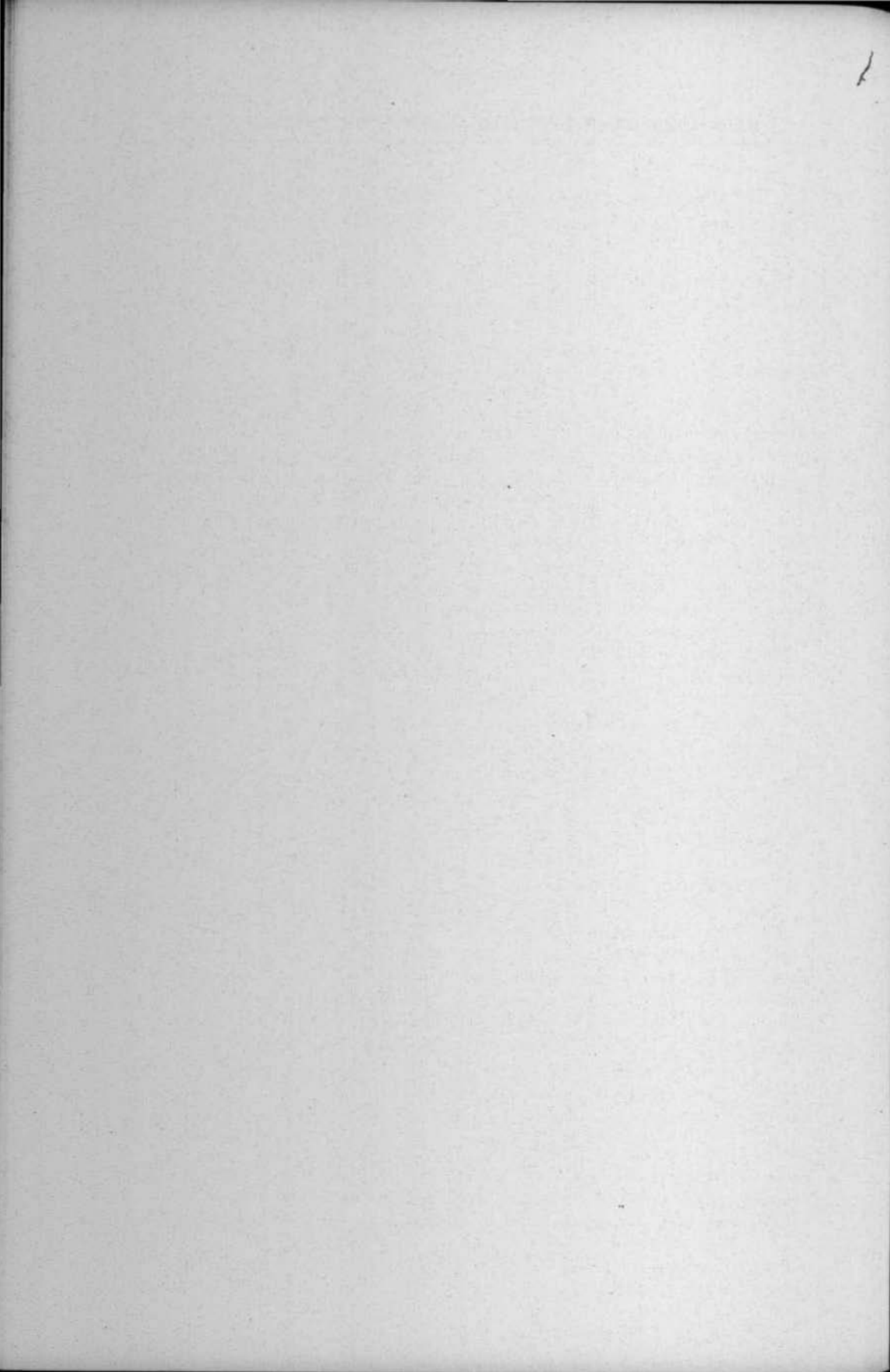
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